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2518
No. 11861

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. D. GREGG,

Appellant,

vs.

HENRY WALLACE WINCHESTER, ERNEST
JOSEPH STEWART, et al.,

Appellees.

Transcript of Record
In Two Volumes
VOLUME I
Pages 1 to 312

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

MAY 11 1948

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

DONALD J. DUNNE,
WOOD, CRUMP, ROGERS, ARNDT, &
EVANS,
458 S. Spring St.,
Los Angeles 13, Calif.

For Appellees:

OLIVER O. CLARK,
ROBERT A. SMITH,
643 S. Olive, Suite 710,
Los Angeles 14, Calif. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court, Southern
District of California, Central Division

No. 7765-PH

HENRY WALLACE WINCHESTER, ERNEST
JOSEPH STEWART, HAROLD ARTHUR
SLACK, PHILIP ARANA, RAY BIEDER-
MAN, SONIA LUZI BAUMGARTNER, RAY
VILLARREAL, HIRAM LYMAN BANIS-
TER, ROBERT LEROY HALLSTROM,
GEORGE MANUEL VILLARREAL,
RALPH FREDERIC LEE, JAMES EDGAR
ANDREW, MILDRED ESTHER
KNOWLES, EVA EVADUE FOX, MARY
BURGER CHAMBERLAIN, RUTH ANNE
CHESWORTH, JOHN ALBERT McCUL-
LOUGH, GRACE MULLINS, OSCAR LAN-
DIS, ATHALIA FARLEY WORST, FRAN-
CES ADAIR, ESTHER MAY WINKLER,
ANSON PITCHER, JOHN DUNKINFIELD,
LECIL CANTRELL, MARGARET LITTEN,
LYLE JASON DEWEY, RIGNALD ALLAN
SHARP, WALTER ASA BRANDON,
ANITA CLANCY BRANDON, HARRY
RAY CLARK, SEABROOK GRUNSHAW,
MARY JANE EIFFLER, ZOLA BADOLAS,
BENSON LOUIS BARDWELL, WALTER
HAROLD STAMATS, EDWARD KLOP-
FENSTEIN, CLYDE PHEREAL CHANEY,
DARIUS LEARA BLADES, ERMA EVE-
LYN IMAN, WILLIAM WILKINSON,
FRASER HAGLEN, KENITH DUANE

RAMINES, HIGH GILLIS, HENRY
MOECKLY, MORTON THOMPSON, DA-
VID HOBBS, MARY ELLEN YATES,
MANOAH PORTER, and GERRY
DELL'OLIO,

Plaintiffs,

vs.

J. D. GREGG, and the CITY OF LOS ANGELES,
a municipal corporation,

Defendants.

COMPLAINT IN EQUITY FOR INJUNCTION,
AND DAMAGES

Plaintiffs complain and allege:

I.

That this action arises under the Constitution of the United States and particularly under the Fifth and the Fourteenth Amendments to said Constitution, as hereinafter more fully appears.

II.

That matters herein complained of arise out of the same series of transactions and present questions of fact and law which are common to all of the plaintiffs herein, as more fully hereinafter set forth.

III.

That these plaintiffs do not have, and none of them has, any plain, speedy or adequate remedy at law.

IV.

That said defendant City of Los Angeles, is, and at all times herein mentioned, was, a municipal corporation organized and existing as such under a municipal charter.

That said defendant John D. Gregg is the owner and in possession of that certain real property, comprising about one hundred and fifteen acres situated in the City of Los Angeles, County of Los Angeles, State of California, described as follows, to wit:

Lots 1, 2, 4, 5, 6, 7, 13 and 14 in Block 19; the Easterly 150 feet of Lot 12 in Block 18; Lots 4 to 9 inclusive, and Lots 15 to 19 inclusive, and Lots 21 and 22, and the Easterly 280 feet of Lot 14, in Block 17; of the Los Angeles Land and Water Company's subdivision of a part of the Maclay Rancho as per map recorded in Book 3 of Maps at Pages 17 and 18 in the Office of the County Recorder of Los Angeles County, California.

That said land, colored in red and designated as the "Critical [3] Area," is shown upon a map marked Exhibit "A" which is hereunto attached and made a part hereof. That said land is hereinafter referred to as the "Critical Area."

V.

That said map is a substantially correct representation of the area covered thereby upon a scale of one inch to each one thousand lineal feet thereof. That the area upon said map which is enclosed within a red line, which line is not more than about

three thousand feet from the various extremities of said "critical" area, and upon the westerly side thereof, follows the easterly boundary of an area shaded in yellow which is designated as an "Unrestricted Area," is herein referred to as the "Community" area, said "Community" area embracing about one and one half square miles. The entire area shown upon said map is herein referred to as the "Map" area. That as a convenience in folding, the top of said map as attached hereto is west.

That each of the areas confined by narrow parallel lines and designated as a named street upon said map, is, and for more than five years continuously last past, has been, a public highway regularly dedicated, improved, and used as such. That said public highways which are shaded in green upon said map, are, and for more than five years continuously last past, have been, improved with a concrete pavement. That said paved highways within said "Community" area are seven and eighty-four hundredths miles in length, and the unpaved highways within said area are five and one-half miles in length.

That the area shaded in green and designated as a "Community Park" upon said map, contains fifteen acres of land, and is, and ever since 1928, has been, a public park, improved and maintained as such by the Park Department, and under the management of the Playground Commission, of said defendant City of Los Angeles, and extensively used as such by the inhabitants of the area shown upon said map. [4]

That the area shaded in green and designated as a "School" upon said map, contains about four acres, and is, and continuously since during the year 1942, has been, a public kindergarten and elementary grade school, improved and maintained as such by the Board of Education of said defendant City of Los Angeles, and used as such by the pupils of kindergarten and elementary grade age residing in said community.

That the area shaded in green upon said map, and designated respectively, as "Community Chapel" and "Community Church," which church is on the Sunland Boulevard, are, and for more than five years continuously last past, have been, owned, improved, and used, as places of public worship for the residents of said "Community" area, and the area shaded in green, marked "Community Church," and which lies between said "School" and said "Park," upon said map, is, and for more than eighteen months last past, has been, under improvement as a place for public worship.

That the area lying westerly of Randall Street, and southerly of the southerly line of said "Community" area, which line parallels Glenoaks Boulevard, is, and ever since about February, 1933, has been, zoned to permit the commercial excavation and production of rock aggregates, and is referred to as an M-3 zone.

That said defendant John D. Gregg began during, or about, the year 1934, and subsequent thereto has accomplished, the excavation of rock, sand, and gravel upon about thirty-five acres of a sixty-two

acre tract of land, owned by him, and lying within said M-3 zone and distant about three hundred feet southerly from said Glenoaks Boulevard, and immediately southerly of the boundary of said "Community" area as it passes that portion of said "Critical" area which extends southerly from Glenoaks Boulevard. That said defendant maintains upon said land, machinery, equipment, and other facilities, for the excavation of such materials and the processing thereof for market.

That all of the areas shaded in black upon said map, are, and on October 2, 1946, were, and most of them have been for more than [5] five years continuously last past, improved, occupied, and used, as family homes for human residents. That said homes number three hundred and fifty-nine within said "community" area, and nine hundred and ninety-two within the area covered by said map.

That the lands shaded in yellow and designated as an "Unrestricted" area upon said map, and the easterly boundary of which is the westerly boundary of said "Community" area, lie within the natural channel of an ancient watercourse commonly known as the east branch of the "Tujuna Wash," and are, and always have been, unrestricted as to their use for the commercial production of rock, sand, and gravel.

VI.

That during the year 1914 the Los Angeles Land and Water Company, a California corporation, hereinafter referred to as the "Land Company,"

was the owner and in possession of a tract of land comprising about three thousand acres, which included the land lying within said "Community" area, and the lands lying within said "Unrestricted" area, and other lands adjacent to said areas.

That during said year, and while the owner of said lands, said land company caused said lands to be surveyed and classified in respect of their natural adaptability for residential, horticultural, and agricultural, development and use, and for the commercial production of rock, sand, and gravel.

That in and by said survey and classification said land company classified the lands lying within said "Unrestricted" area as naturally adapted to the commercial production of rock, sand, and gravel, and classified the remainder of its said lands, including the lands situated within said "Community" area as naturally adapted to residential, horticultural, and agricultural, development and use.

That the commercial production of rock, sand, and gravel, was then, at all times since has been, and now is, the highest, best, and most valuable, use to which said lands so classified for such use, as aforesaid, were adapted, for the reasons that said lands lie within [6] the natural channel of said ancient watercourse; are constituted of rock, sand, and gravel of commercial quality and in commercial quantity, which materials are overlaid with a very thin structure of unproductive soil, or are altogether exposed, and that a pit excavated thereon for the production of said materials was, until the completion of the Hansen Dam in 1942, susceptible to

refilling by the discharge of water, rock, sand, and gravel, which occurs annually in the upper reaches of said watercourse.

That the residential, horticultural, and agricultural, development and use of said lands, including all of the lands within said "Community" area, so classified, for such use, as aforesaid, then was, at all times since has been, and now is the highest, best, and most valuable, use to which said lands are adapted, for the reason that said lands do not lie in the natural channel of any watercourse; are overlaid with a stratum of productive sandy loam; are upon a gently sloping plane with a slightly undulating surface; are within an area of moderate climatic changes, and of climatic conditions favorable for human residence and for plant growth, and are substantially improved for residential use, by homes, churches, schools, parks, paved highways, and public utilities.

That there are now, and for more than three years continuously last past there has been, more than 1650 persons residing within said "Community" area, and more than 7500 persons residing within said "Map" area. That 218 of the 1650 persons residing within said "Community" area, now are, and on October 2, 1946, were, children between the ages of four years and thirteen years and 110 of the said 1650 persons are, and on said date were, children between the ages of twelve years and seventeen years.

VII.

That thereafter, during the year 1914, said land company executed a contract for the sale to Fernando Valley Development Company, a corporation, of about twenty-two hundred acres of said [7] land, including the lands within said "Community" area, so classified as best adapted to residential, horticultural, and agricultural development and use, as aforesaid, and thereupon, and during said year, said corporations caused to be prepared, executed, and recorded in the office of the County Recorder of Los Angeles County, California, a declaration in writing by which the commercial production of rock, sand, and gravel, within or upon said lands so classified as best adapted to residential, agricultural, and horticultural development and use, including the lands which comprise said "Community" area, to wit, until April, 1934. That said restrictions remained in full force and effect throughout said twenty-year period.

VIII.

That on or about the 11th day of April, 1918, the lands which comprise said map area and a large body of lands adjacent thereto on all sides, were annexed to said defendant city.

That thereafter, to wit, during the year 1925, nearly nine years before the expiration of said private restrictions, said defendant city enacted its zoning ordinance Number 52,421, whereby the lands which comprise said community area were restricted to residential use and development, and, operations

for the commercial production of rock, sand, and gravel, were excluded therefrom.

That said ordinance remained in effect as to said lands in said "Community" area until superseded by Zoning Ordinance Number 74,140 enacted by said defendant city and effective October 27, 1934.

That said ordinance number 74,140 restricted the lands within said community area to residential development and use, and prohibited therein or thereon any operations for the production of rock, sand, and gravel. That said ordinance remained in force until superseded by a comprehensive zoning ordinance, number [8] 90,500, which became effective on June 1, 1946.

IX.

That in June, 1926; May, 1927; on August 15, 1927, and August 27, 1927, said defendant city by its enactment of its ordinances numbers, respectively, 55,129; 57,958; 58,624, and 58,775, expressly reaffirmed its zoning classifications of said "Community" area as a residential area, and its exclusion therefrom of operations for the commercial production of rock, sand, and gravel.

X.

That in 1934, C. S. Smith and Wm. Evans made written application to the Planning Commission of the defendant city, for a variance permit to conduct operations for the commercial production of rock, sand, and gravel, upon lots 9 and 10, in block 22, within said "Community" area. That said application was denied by said Planning Commission, by

the unanimous votes of its members, on August 24, 1934.

That thereafter Claire Schweitzer made written application to said Planning Commission for a variance permit to conduct operations for the commercial production of rock, sand, and gravel upon lots 5, 6, 7, 13, and 14, in block 19, within said "Community" area. That said application was denied by said Planning Commission, by the unanimous votes of its members, on July 7, 1936. That an appeal was taken by said applicant, from said denial, to the City Council of said defendant city, and upon September 18, 1936, said appeal was denied by said City Council. That the land as to which said variance permit was sought, comprises about twenty-five acres and lies in about the center of said "Critical" area.

That thereafter H. I. Miller made written application to said Planning Commission for a variance permit to conduct operations [9] for the commercial production of rock, sand, and gravel, upon lots 5, 6, 7, 13, and 14, in block 19, within said "Community" area. That the land as to which said variance permit was sought, comprises about twenty-five acres and lies in about the center of said "Critical" area. That said application was denied by said Planning Commission by the unanimous votes of its members, on July 7, 1939. That an appeal was taken by said applicant, from said denial, to the City Council of said defendant city, and upon September 25, 1939, said appeal was denied by said City Council.

That thereafter said defendant John D. Gregg made written application to said Planning Commission for a variance permit to conduct operations for the commercial production of rock, sand, and gravel upon lots 12 and 24 in block 18, within said "Community" area. That said application was denied by said Planning Commission, by the unanimous votes of its members, on January 25, 1940. That said lot 12 of the land as to which said variance permit was then denied, is that part of said "Critical" area which lies southerly of Glenoaks Boulevard.

That thereafter F. H. Haines made written application to said Planning Commission for a variance permit to conduct operations for the commercial production of rock, sand, and gravel, upon lot 7, in block 20, within said "Community" area. That said application was denied by said Planning Commission by the unanimous votes of its members on March 11, 1941.

That thereafter Sam and Pauline Katz made written application to said Planning Commission for a variance permit to operate a riding academy upon a parcel of land 170 feet wide and 470 feet deep, at number 9821 Stonehurst Avenue, at the junction of said avenue with Art Street, within said "Community" area, and that said application was denied by said Planning Commission by the unanimous votes of its members, on November 28, 1945.

XI.

That during, or about, the year 1928, residents within said [10] "Community" area, and in territory adjacent thereto, petitioned the Park Commission of said defendant city, that an election be called for the purpose of voting upon a proposition to issue bonds as a lien upon the real property within said area, to secure money with which to purchase land within said "Community" area, and to improve the same as a public recreation and assembly center. That thereupon said election was called and held, and said bond issue was approved, and the bonds thus authorized were issued and sold. That thereupon the area which contains about fifteen acres, and which is shaded in green and designated "Community Park," upon said map, and which lies immediately across a forty foot street from said critical area, was improved with landscaping and plantings; outdoor recreational facilities, and an Administration and Community Club House building, fully furnished. That said building, last named was erected in 1931, and today it would cost more than \$50,000 to duplicate. That the cost of said land and improvements was in excess of \$50,000 and they could not be duplicated now for less than, and are reasonably worth, \$100,000. That the monies obtained from said bond issue, together with other monies available to said Park Commission were used for the purchase and improvement of said property.

That a substantial part of the principal sum of said bonds is unpaid. That said unpaid balance will

mature in installments, annually, during the twelve years next ensuing, and constitutes a lien upon all of the real property within said "Community" area including the lands owned by each of the plaintiffs named herein.

That at the time when the residents of said "Community" area petitioned for said election, and voted for said bonds, as aforesaid, they knew, and the facts were, that the land holdings of said land company had been surveyed, classified, and restricted, as aforesaid, and that said defendant city, by the enactment of its zoning ordinances, as aforesaid, had encouraged the development of said [11] "Community Area" for residential purposes, and had prohibited any extension within said "Community" area, of any operation for the commercial production of rock, sand, and gravel, within said area, as aforesaid, and that lands within said "Community" area had been sold, and were being sold, upon and subject to said restrictions and zoning which prohibited the conduct thereon of any operation for the commercial production of rock, sand, and gravel, as aforesaid, and that said "Community" area was being developed and used as a residential area, in reliance, upon said restrictions and prohibitions.

That at the time of the making of said petition, and the voting of said issue of bonds, said residents of said "Community" area understood and believed, by reason of the matters herein alleged, that said "Community" area would continue to be developed and used as a residential area within which operations for the commercial production of rock, sand,

and gravel, would be prohibited, and had it not been for such understanding and belief said petition would not have been made, and said bonds would not have been voted.

That the recreational facilities established, as aforesaid, have been maintained constantly since their inception, and are now maintained, under the management and supervision of the Playground Commission of said defendant city, and they always have been, and are extensively patronized and used by the residents of said "Community" area, and of the territory adjacent thereto, including numerous children of kindergarten and elementary grade school ages. That the attendance upon said facilities by said residents during the year last past has been, and now is, from a minimum of 110 to a maximum of 800 persons each day, and from a minimum of 1000 to a maximum of 2000 persons each week.

XII.

That for many years prior to the year 1942, and until abandoned during that year, as herein alleged, the Los Angeles City Board of Education maintained and conducted a public kindergarten, and elementary grade school, commonly known and referred to as the Remsen [12] Avenue School, on Ramsen Avenue, now Glenoaks Boulevard, at the northeast corner of its junction with Truesdale Avenue, adjacent to said "Unrestricted" area. That the site of said school prior to its abandonment, as herein alleged, is shown upon said map as a hatched area designated as "Abandoned School."

That during the year 1942, residents of the area, including said "Community" area, whose children attended said Remsen Avenue School, requested said Board of Education to abandon said Remsen Avenue School because of its proximity to prospective permissible operations for the commercial production of rock, sand, and gravel, and the hazards to said pupils incident to such operations, including the excavation and maintenance of deep pits dangerously attractive to children of kindergarten and elementary grade school age; the heavy trucking traffic, and the noise and dust incident to such production and trucking operations, and to establish a new kindergarten and elementary grade school within said "Community" area, as a replacement for said abandoned school. That prior to the abandonment of said Remsen Avenue School, as herein set forth, there was no public school located within said "Community" area.

That at the time when said request was made it was known to the residents of said area who made said request, and to a very large number of other residents of said "Community" area who were interested in the maintenance of safe school conditions for the children of kindergarten and elementary grade school age who resided in said "community" area, and to the members of said Los Angeles City Board of Education, and the facts were, that continuously for more than twenty-eight years immediately theretofore, the owners and subdividers of the lands lying within said "Community" area, and, subsequent to the annexation of

said area to said defendant city in 1918, the Planning Commission; the Playground Commission; the Board of Education, and the City Council of said defendant City of Los Angeles, had declared and maintained, as aforesaid, a policy of prohibiting within said [13] "Community" area, any extension of operations for the commercial production of rock, sand, and gravel, and of encouraging by said policy of restriction, the development of said "Community" area as a residential district wherein the children residing within said area could attend upon and use the facilities of any school; churches; recreational park, and roadways leading thereto, established and maintained in said "Community" area, as herein set forth, with a minimum risk of dangers incident to heavy trucking traffic upon the highways, and the proximity of deep and dangerous pits excavated in the commercial production of rock, sand, and gravel, and attractive to children of kindergarten and elementary school grade ages, and the dust, dirt, and noises, which customarily and inevitably resulted, and result from such operations. That at the time of said request, the residents within the area served by said Remsen Avenue School, which included the residents of said "Community" area, and the Board of Education; the Planning Commission; the Park Commission; the Playground Commission; and the City Council, of said defendant City of Los Angeles, knew, and the fact was, that the establishment and maintenance of places frequented by the public, including schools; playgrounds; churches; assembly halls, and

highways, in a vicinity wherein deep and extensive pits were excavated, and other operations were conducted, in the commercial production of rock, sand, and gravel, was extremely inadvisable because human experience taught that such operations in such a community, had theretofore constituted, and then constituted, and would continue to constitute, a very serious hazard to the safety, well being, and comfort, of the residents of such a community, and particularly to children of kindergarten, and elementary grade school age, to whom the presence of such conditions was prejudiciously attractive, and was prejudicial to the general public welfare, health, and safety.

That upon receiving said request for the abandonment of [14] said Remsen Avenue School, and the establishment of a kindergarten and elementary grade school within said "Community" area, for the reasons herein stated, said Board of Education informed said defendant City of Los Angeles of said request, and of the reasons therefor as herein stated, and inquired of said defendant as to the permanency of its policy to prohibit any extension within said "Community" area, of operations for the commercial production of rock, sand, and gravel, which policy was evidenced by said zoning ordinances, as aforesaid, and by said city's denial of said six applications for variance permits in 1934; 1936; 1939; 1940, and 1941, respectively, as hereinbefore set forth, and was informed by said defendant city, that it was the permanent policy of said city to prohibit within said "Community" area, and to exclude

therefrom, any extension of any operation for the commercial production of rock, sand, and gravel, and to encourage the development and use of said "Community" area for residential purposes.

That said Board of Education, and the residents of the area served by said Remsen Avenue School, including the residents of said "Community" area, believed the representations of said defendant City of Los Angeles, made as aforesaid, and relied thereupon, and, in such belief and reliance, and for the reasons herein stated, and not otherwise, said Remsen Avenue School was abandoned in 1942, and, during said year, a new school, known as the "Stonehurst" School, was constructed and placed in use upon land, comprising about four acres, then purchased for that purpose, by said Board of Education, within said "Community" area. That the land so purchased, improved, and used for said school, is shown upon said map by a green shading designated as "School." That said school is within six hundred feet of said "Critical" area.

That said school opened in 1942 with an enrollment of 221 pupils of kindergarten and elementary grade age. That the number of pupils enrolled in said school has constantly increased, and the present enrollment thereat is more than 418. [15]

XIII.

That during the years 1945, and 1946, said defendant City of Los Angeles, made an extensive resurvey and study of its master plan of zoning the area within its municipal boundaries, including the

area involved herein, lying in what is commonly known and referred to as the San Fernando Valley.

That upon the conclusion of said resurvey and study, said defendant city, acting through its agencies as prescribed by law, including its Planning Commission; Engineering Department, City Council, and Mayor, determined, and concluded, that the general public welfare; health; safety; comfort, and convenience, and the welfare; health; safety; comfort, and convenience, of the residents within said "Community" area, justified and required a continuance of said zoning restriction upon any extension within said "Community" area, of any operation for the production of rock, sand, and gravel, and thereupon, and on March 7, 1946, said defendant city enacted its Ordinance No. 90,500 wherein and whereby the zoning restrictions which were then, and for more than twenty-one years continuously had been, in force upon said "Community" area, were continued, and any operation for the production of rock, sand, and gravel, within said "Community" area, was prohibited. That said ordinance became effective on June 1, 1946, and is, and at all times since said date has been, in full force. A copy of said ordinance number 90,500, is hereunto attached, marked Exhibit "B", and made a part hereof.

That under, and by reason of, the encouragement derived from the natural adaptability of the land lying within said "Community" area, to residential development and use, and the restrictions imposed

thereon and maintained, by private restrictions and governmental zoning, as aforesaid, against any extension within said "Community" area of any operation for the production of rock, sand, and gravel, said "Community" area developed by steady and substantial growth and improvement up to October 2, 1946, into, and on said date it was, [16] predominately a substantial residential community, embracing within its area of about one and one half square miles, more than 360 homes of a reasonable value in excess of \$2,500,000; more than 1500 residents including more than 328 children over four, and under sixteen, years of age; public kindergarten and elementary grade school facilities of a reasonable value in excess of \$50,000; public recreational and park facilities of a reasonable value in excess of \$100,000; church facilities of a reasonable value in excess of \$75,000; an American Legion Hall; a well equipped medical clinic; nearly eight miles of concrete paved highways; adequate water, gas, and electrical service; fire protection; and reasonable motor transportation.

XIV.

That during the fifteen years immediately preceding October 2, 1946, in contemplation of its residential development and use, restricted and zoned, as aforesaid, as its highest and most valuable use, the market value of land within said "Community" area, increased from about five hundred dollars per acre, to about three thousand dollars per acre, and the assessed valuation of said lands,

for public taxation, was progressively and substantially increased, and during the year 1946, and prior to the application of said John D. Gregg for a variance permit, as herein alleged, the assessed valuation of said lands for public taxation, was increased by twenty-five per cent to one hundred and twenty-five per cent of its then assessed valuation for taxation.

XV.

That during, or about, the month of September, 1941, said defendant John D. Gregg became the president and active manager of said Los Angeles Land and Water Company, and ever since said date he has held, and now holds, said offices.

That plaintiffs are informed and believe, and therefore allege, that said defendant John D. Gregg at the time when he succeeded to the office of president of said land company, as aforesaid, [17] was, and ever since has been, and now is, the owner of a substantial interest in said land company.

That plaintiffs are informed and believe, and therefore allege, that at the time when said defendant John D. Gregg acquired his said interest in said land company, he knew that the land lying within said "Community" area had been originally owned; classified, and restricted as to its use, by said land company, and had been zoned by said defendant city, as herein alleged, and that the major part thereof had been sold by said land company for residential, horticultural, and agricultural, development and use, and had been, and was devoted to such use.

XVI.

That during a period of about five years immediately last past, said defendant John D. Gregg acquired by purchase, in several separate parcels and at several different times, the land which comprises about one hundred and fifteen acres, and constitutes said "Critical" area within the heart of said "Community" area, as shown upon said map.

That at the time when said defendant John D. Gregg purchased each of said parcels of land which now constitute said "Critical" area, as aforesaid, said defendant knew, and the facts were, that said land had been classified in 1914 by said land company, as best adapted to residential, horticultural and agricultural development and use, as herein alleged, and he knew that said land had been restricted as to its use, by said land company, and by said zoning ordinances enacted by said defendant city prior to the year 1946, as herein alleged, and he knew that each of said six applications to said defendant city for a variance permit to conduct operations for the commercial production of rock, sand, and gravel, within said "Community" area had been made, and that three of said applications involved lands purchased by him and situated within said "Critical" area, as aforesaid, and that said applications had been denied, as herein alleged, and he knew that other applications for variance permits to erect improvements and [18] conduct operations that were not of a residential nature, as set forth in paragraph tenth hereof, had been made,

and denied by said defendant city, as hereinbefore alleged.

That at the time when said defendant John D. Gregg purchased said lands, as aforesaid, he also knew, and the facts were, that within said "Community" area a substantial and progressive community of homes; schools; churches, and public parks, recreation facilities, and other places of public assembly, had been developed and were maintained, as herein alleged, in reliance upon said restrictions, and said zoning, which prohibited any extension within said area of operations for the commercial production of rock, sand, and gravel, as herein alleged, and that in such reliance said community of homes had been provided, with reasonable adequacy, at great public and private expense, as herein alleged, with about eight miles of paved highways; kindergarten and elementary grade school facilities; with church facilities; with community recreational and park facilities with an American Legion Hall; with a Medical Clinic; with motor transportation; with water, gas and electrical service, and with fire protection, and that in consequence of said restrictions and zoning, and of said development and use, of said lands, the intrinsic value, and the market value, and the assessed value for purposes of taxation, of lands within said "Community" area, had substantially appreciated, as herein alleged, and that said lands were in substantial demand for residential development and use.

XVII.

That at the time when said defendant John D. Gregg purchased said lands which comprise said "Critical" area, as aforesaid, said defendant knew, and the facts then were; ever since have been, and now are, that any substantial operation upon said land within said "Critical" area for the commercial production of rock, sand, and gravel, would create, and constitute, a very substantial, serious, dangerous and permanent hazard and detriment to the general public [19] welfare, health, and safety of the community within said "Community" area, and to the inhabitants of said community, and would substantially and materially interfere with, interrupt, disturb, and impair, the use, and comfortable enjoyment, of their respective properties within said "Community" area, by the owners, and by the inhabitants, of said properties, respectively, and would substantially depreciate the intrinsic value, and the reasonable market value, of all of the lands lying within said "Community" area, and would create a reasonable apprehension that such operations would eventually result in a substantial erosion of the highways abutting upon said "Critical" area, and of the lands abutting upon said highways immediately opposite said "Critical" area, and that such operations would be prejudicial to the general public welfare, and conveniences, and would not be in harmony with the various, or with any of the, elements, or objectives, of the zoning ordinances as adopted by said defendant city, as aforesaid.

XVIII.

That subsequent to the purchase of said defendant John D. Gregg, of said parcels of land which now comprise said "Critical" area, as aforesaid, and subsequent to the enactment of said zoning ordinance by said defendant city in March, 1946, said defendant John D. Gregg, notwithstanding his knowledge of facts and events as herein alleged, applied to the Planning Commission of said defendant city, for a variance permit to conduct operations for the commercial production of rock, sand, and gravel, from and upon said lands purchased and owned by him, as aforesaid, and which comprise said "Critical" area.

That in support of his said application, said defendant John D. Gregg represented to said City of Los Angeles, that the property constituting said "Critical" area and as to which said defendant John D. Gregg then sought said variance permit was situated in a district the character of which was unsuited for residential purposes; that said land was composed of gravel beds, and was primarily [20] suitable only for production of rock, sand, and gravel; that his proposed use of said property was essential to the public convenience and welfare, and was in harmony with the various elements or objectives of the Master Plan of Zoning as enacted by said defendant city, as herein alleged; that his proposed use of said lands would not be detrimental to the developments surrounding the lands as to which said variance permit was sought, and would not adversely affect individual property

rights, or interfere with the enjoyment of property rights of property owners in the vicinity of said "Critical" area, or affect any legal rights of such property owners.

XIX.

That at the time when said representations were made by said defendant John D. Gregg, as aforesaid, each of said representations was false and untrue, and said defendant John D. Gregg then well knew that each of said representations was false and untrue.

That at the time when said application was made by said defendant John D. Gregg, it was a fact, and a matter of public record, that since the year 1935, twenty children who had been attracted to the gravel pits created in said San Fernando Valley by the commercial production of rock, sand, and gravel, had accidentally lost their lives in said pits, and that many children similarly attracted, had sustained serious injuries, accidentally, in said pits.

That said facts were of such common knowledge in said San Fernando Valley at the time when said application was made, that it is a reasonable inference that said John D. Gregg well knew thereof.

XX.

That thereafter, to wit, on July 25, 1946, after a public hearing; an inspection of the property, and a thorough consideration of all the facts presented, the Planning Commission of said defendant city, by the unanimous vote of its members, denied said application, and, contrary to said representations of

John D. Gregg, stated that it found that the property as to which said variance permit was [21] sought, could be utilized for residential purposes as evidenced by the residential development in the immediate neighborhood of said land; that the then existing zoning which prohibited the commercial production of rock, sand, and gravel, from or upon the lands as to which said permit was sought, was an appropriate zoning for said property and for the general area in which said property was situated; that the proposed use of said lands would interfere with a reasonable enjoyment by a substantial number of property owners in that vicinity, of their homes and community facilities; that the extensive excavations and pits which would be left after operations had been completed for the commercial production of rock, sand, and gravel, upon and from said lands as to which said variance permit was sought, would create an unsightly and dangerous condition which would be detrimental to the public welfare, and particularly to the public safety, and would leave said land in a condition unsuited for any use in keeping with other properties in said community, and that to permit an extension of such operations upon the property as to which said variance permit was requested, would not serve any public convenience, and would adversely affect individual property rights in that community, and would interfere with the normal growth of said community, and would conflict with the objectives of the Master Plan of Zoning as incorporated in said

zoning ordinances enacted by said defendant city, as herein stated.

XXI.

That thereafter said defendant John D. Gregg appealed to the City Council of said defendant city, from said denial by said City Planning Commission of his said application, and thereafter, to wit, on October 2, 1946, said City Council granted said application.

That said grant of said application was made upon the following conditions, to wit:

1. That the applicant construct a 6-foot cyclone type mesh wire fence around the said property, including barbed wire on the top of said fence providing the Fire [22] Department grants permission for same.

2. That no permanent plant building or structure be installed or maintained on said property and that all material excavated be mined by an electrically powered shovel and primary crusher and transported by a conveyor belt system running through a tunnel or tunnels under Glenoaks Boulevard to the plant now owned and operated by applicant, lying southwesterly of said Boulevard and processed at said plant.

3. That a setback line of fifty feet from all property lines and existing streets be maintained and that slopes of excavations be maintained at one foot to one foot.

4. That the area between all property lines

or street lines and 50 foot setback be screen planted progressively as excavations proceed.

XXII.

That said granting of said application was accomplished by the affirmative vote of eleven members of said City Council who, within the eight months immediately preceding said grant, had voted for the adoption of said zoning ordinance No. 90,500 on March 7, 1946, and, who, thereby had found and determined, upon an exhaustive resurvey and study of zonal planning in the San Fernando Valley, that the conditions and developments within said "Community" area justified and required for the promotion of the public welfare; the preservation of public health and safety, and the protection of property rights, that any extension of operations for the commercial production of rock, sand, and gravel, within said "Community" area, should be prohibited.

That no change of any kind or character occurred during the period of less than eight months between the enactment of said zoning ordinance and said grant of said application for a variance permit, [23] or between the enactments of said two zoning ordinances in 1925 and 1946, respectively, which tended in any way to alter, or otherwise affect, the conditions upon which it had been found and determined in the enactments of said Zoning Ordinances, that the general public welfare, convenience, and safety, and the welfare and safety of the inhabitants of the community in which said "Critical" area is located

and the preservation of the property rights of the inhabitants of said "Community" area, required a continuance of the prohibition of such operations within said "Community" area.

That at the time when said application by said John D. Gregg for said variance permit, was made, and was pending, and at the time when said application was granted by said City Council, as aforesaid, it was a definite improbability, and always had been a definite improbability, that any practical difficulty, or any unnecessary hardship or result inconsistent with the general purposes of any of said Zoning Ordinances, would result from the strict and literal interpretation and enforcement of the provisions of said Zoning Ordinances.

That there was not during said period, and never has been, any exceptional or extraordinary circumstances or condition, applicable to the property, or to the intended use of the property, as to which said variance permit was sought and obtained, as aforesaid, that did not apply generally to the property or class of uses in the same district or zone.

That such a variance was never necessary for the preservation or enjoyment of any substantial property right of said John D. Gregg possessed by other property in the same zone and vicinity.

That there never was a time within the fifteen years, and longer, immediately last past, when it would not have been materially detrimental to the public welfare, or injurious to the property or improvements, in the zone or district in which the land which comprises said "Critical" area is lo-

cated, to grant such a variance [24] permit, or when the granting of such a variance permit would not adversely affect the Master Plan of said Zoning Ordinance.

That the conduct of the eleven members of said City Council at the session of said City Council whereat said appeal of said defendant John D. Gregg was considered, and said variance permit was granted, and who controlled the deliberations and action of said City Council in respect of said matter, was arbitrary, unreasonable, unfair, and in excess of the limits of their authority.

That said conduct of said eleven members of said City Council are inexplicable upon any rational ground, and then were, and now are, utterly repugnant to the concept and objectives of said zoning plan, and subversive of the public welfare, health, and safety, and of the property rights of the land owners and residents within said "Community" area, including these named plaintiffs.

XXIII.

That there did not exist at the time when said application was made, or at any time thereafter, and there does not now exist, any necessity either public or private, for the commercial production of rock, sand, or gravel, from, or upon any of the lands which comprise said "critical" area, and such a use of said property is not, and never has been, essential or desirable to the public convenience or welfare, or in harmony with the various elements or objectives of the Master Plan of Zoning as

adopted and declared by said defendant city, as aforesaid.

That there is now, and continuously for many years, immediately last past there has been, an adequate, available, quantity of commercial rock, sand, and gravel, in the natural deposits of said materials in the areas in Los Angeles County, wherein the commercial production of said materials is reasonably permissible, and is economically feasible, to supply all of the needs and demands for said materials, of a quality reasonably comparable to the quality of [25] such materials that could be produced from the lands in said "Critical" area.

XXIV.

That within a few days, to wit, on or about October 10, 1946, after the granting of said variance permit by said City Council as aforesaid, resident owners of real property within said "Community" area, caused to be served upon said defendants, a notice in writing that an action would be begun against said defendants, wherein the plaintiffs would seek to permanently enjoin said defendant city from permitting, and said defendant John D. Gregg from engaging in, any operation for the commercial production of rock, sand, and gravel within, or upon any of the lands within said "Critical" area.

XXV.

That said defendant John D. Gregg threatens to, and will, unless restrained by an exercise of judicial authority, to excavate to a depth of one hundred

feet, or more, the land which comprises said "Critical" area, for the commercial production of rock, sand, and gravel, as purportedly authorized by said variance permit.

That for said purpose, said John D. Gregg threatens to, and will if permitted so to do, excavate said "Critical" area to a depth of one hundred feet, or more, with a sidewall slope of not more than one horizontal foot to each vertical foot of depth, and which sidewalls at surface will extend to fifty feet, or less, from the property lines and existing streets which now bound said "Critical" area. That such an extraction of said material from said land, would create a permanent void upon said land, because there it not, and cannot be, any reasonable, economical, or practicable, means available for filling such a void upon said land.

That the structure and placement of the materials which compose said lands to said depth, are such that it is a reasonable probability and expectancy that in the course of time, by natural processes of erosion, the sidewalls of such a pit, at their upper surface, will recede until a slope of not less than one and one-half feet horizontally for each vertical foot of depth has been uniformly attained, and numerous gulleys of a depth from one to twenty, or more, feet, will be eroded and extended outwardly from said pit a distance of two hundred feet, or more, and that said banks and gulleys would substantially encroach, in the course of time, upon said public streets, and upon the lands which now bound

said "Critical" area, and upon the lands abutting upon streets opposite the lands which comprise said "Critical" area.

XXVI.

That within and across said "Community" area, almost daily, the wind blows with a moderately strong intensity from southwest to northeast, and from northeast to southwest, and frequently within and across said "Community" area, vagrant winds of equal intensity blow in different and varying directions, and annually in the spring and fall, a wind of great intensity blows with moderate frequency, within and across said "Community" area in varying directions. It is a reasonable expectancy that the influence of natural laws which control and direct the vagaries of said winds, will persist permanently.

XXVII.

That any operation in the excavation of rock, sand, and gravel, on a commercial scale, within or upon said "Critical" area, would frequently, almost daily, pollute the air with dust and dirt, and that said dust and dirt in substantial and obnoxious quantities would be carried by said winds to the properties, respectively, of these plaintiffs, and of others within said "Community" area, similarly situated, and would be deposited upon said properties, and in the homes, and upon the persons, of those plaintiffs, and of others similarly situated.

That such a pollution of the air, and deposits of dust and dirt upon the properties and persons, and within the homes, of these [27] plaintiffs, and of

others similarly situated, is a natural and necessary consequence of any excavation within and upon said lands for the commercial production of rock, sand, and gravel, and such occurrences would constitute a dangerous, obnoxious, and deleterious condition, upon the premises of these plaintiffs and others similarly situated, and upon the highways, and in places of public gatherings, within and throughout said "Community" area, and would substantially deprive these plaintiffs, and all others similarly situated, of their right to enjoy, and of their enjoyment, of their properties and homes, and of said highways, and of said places of public assembly, within said "Community" area.

XXVIII.

That any operation in the excavation of rock, sand, and gravel, on a commercial scale, within or upon said "Critical" area, would, as a natural and necessary consequence thereof, produce loud, rasping, grinding, and obnoxious noises. That said noises would penetrate to the properties and homes of these plaintiffs, and of others similarly situated, within said "Community" area, and would substantially and materially disturb these plaintiffs, and said other persons, in their respective use and enjoyment of their properties and homes, and would substantially and materially impair and diminish their enjoyment, respectively, of their properties and homes, and of the highways and places of public assembly, within said "Community" area.

XXIX.

That any substantial operation for the commercial production of rock, sand, and gravel, within or upon said "Critical" area, would, as a natural consequence thereof, substantially depreciate the intrinsic value and the market value of all of the lands whether in public or in private ownership, within said "Community" area, outside of said "Critical" area, and if persisted in until a substantial portion of said "Critical" area had been excavated to a depth of about fifty [28] feet or more, such operations would practically destroy the intrinsic value, and the market value, of said lands.

XXX.

That each of the plaintiffs herein, respectively, is the owner of a parcel of land situated within said "Community" area, as shown upon said map, as follows, to wit: Henry Wallace Winchester, 11155 Allegheny Street; Ernest Joseph Stewart, 9464 Sunland Boulevard; Harold Arthur Slack, 9485 Sunland Boulevard; Philip Arana, 9715 Stonehurst; Ray Biederman, 9727 Stonehurst; Sonia Luzi Baumgartner, 9823 Stonehurst; Ray Villarreal, 9880 Stonehurst; Hiram Lyman Banister, 10921 Art Street; Robert Leroy Hallstrom, 10917 Art Street; George Manuel Villarreal, 10907 Art Street; Ralph Frederic Lee, 10875 Art Street; James Edgar Andrew; 11015 Fenway Street; Mildred Esther Knowles, 11021 Fenway Street; Eva Evadue Fox, 11344 Fenway Street; Mary Burger Chamberlain, 11057 Fenway Street; Ruth Anne Chesworth, 11047

Fenway Street; John Albert McCullough, 11083 Fenway Street; Grace Mullins, 11059 Wicks Street; Oscar Landis, 11063 Wicks Avenue; Athalia Farley Worst, 11067 Wicks Avenue; Frances Adair, 11072 Wicks Avenue; Esther May Winkler, 11073 Wicks Avenue; Anson Pitcher, 11084 Wicks Avenue; John Dunkinfield, 11079 Wicks Avenue; Lecil Cantrell, 11049 Art Street; Margaret Litten, 11116 Wicks Avenue; Lyle Jason Dewey, 11053 Fenway Street; Rignold Allen Sharp, 11433 Wicks Avenue; Walter Asa Brandon, 11349 Allegheny Street; Anita Clancy Brandon, 11419 Allegheny Street; Harry Ray Clark, 11180 Allegheny Street; Seabrook Grunshaw, 11181 Allegheny Street; Mary Jane Eiffler, 11154 Allegheny Street; Zola Badolas, 11167 Allegheny Street; Benson Louis Bardwell, 11143 Allegheny Street; Walter Harold Stamats, 11137 Allegheny Street; Edward Kloppenstein, 11131 Allegheny Street; Clyde Phereal Chaney, 11125 Allegheny Street; Darius Leora Blades, 11124 Allegheny Street; Erma Evelyn Iman, 11136 Allegheny Street; William Wilkinson, 11142 Allegheny Street; Fraser Haglin, 11144 Allegheny Street; Kenity Duane Ramines, 11119 Allegheny Street; High Gillis, 11134 Allegheny [29] Street; Henry Moeckly, 11120 Allegheny Street; Morton Thompson, 11116 Allegheny Street; David C. Hobbs, 11111 Allegheny Street; Mary Ellen Yates, 11103 Allegheny Street; Manoah Porter, 11102 Allegheny Street; Gerry Dell'olio, 10962 Peoria Street.

That each of said parcels of land is, and for many years continuously last past, has been, improved,

occupied, and used, as and for residential uses and purposes, and of a reasonable market value in excess of \$12,000, excepting said property of said plaintiff Gerry Dell'olio, which comprises about fifteen acres, and is improved with a commercial bearing table grape vineyard, and abuts upon the easterly side of Peoria Street immediately adjoining said "Critical" area on the northerly side thereof, and is worth in excess of \$30,000.

That each of said plaintiffs, respectively, excepting said plaintiff Gerry Dell'olio, actually resides with his family upon his said property. That included in the aggregate families of thirty-two of said plaintiffs are seventy children under the age of sixteen years.

That the conduct of operations for the excavation and production of rock, sand, and gravel from said "Critical" area, as authorized, purportedly, by said variance permit of October 2, 1946, would depreciate the reasonable market value of each of the properties of said plaintiffs, respectively, in a sum substantially in excess of \$3,000.00 and that by reason thereof each of said plaintiffs, respectively, by reason of the conduct of said operations would be damaged in a sum in excess of \$3,000.00.

That Archie I. Way, G. T. Winkler, Donald Kersey, Charles Wise, William Franklin Borrowe, Frank E. Wright, B. R. Fondren, Robert D. Hopkins, and R. E. Bertell, are, and were when said application was first made by said John D. Gregg for said variance permit, as herein alleged, the owners, respectively, and in possession, of twelve

parcels of real property situated within said "Community" area, and which abut upon Wicks Street, on the westerly side thereof, southerly from said "Community Park," and which face said "Critical" area, and which parcels, respectively, are shown upon said map. That said nine named persons continuously, were such owners and in possession of said properties, respectively, during the entire period following these dates, respectively, March 1946, as to said Archie I. Way; 1931, as to said G. T. Winkler; August 1945, as to said Donald Kersey; 1928, as to said Charles Wise; April 1945, as to said William Franklin Borrowe; April 1940, as to said Frank E. Wright; February 1946, as to said B. R. Fondren; January 1946, as to said Robert D. Hopkins, and 1929, as to said R. E. Bertell. That during said periods, respectively, said twelve properties were, and now are, improved, and occupied and used by said persons, respectively, or by their lessees, for residential uses and purposes.

That Dwight Moore, T. O. Easley, and Betsy Ross, are, and were when said application by said John D. Gregg, was first made as herein alleged, the owners, respectively, and in possession of three parcels of real property, within said "Community" area, which abut upon Wicks Street, on the easterly side thereof, southerly from that portion of said "Critical" area which abuts upon the easterly side of said Wicks Street, and shown upon said map.

That said three named persons, continuously, were such owners and in possession of said properties, respectively, during the entire periods following

these dates respectively, November, 1944, as to said Dwight Moore; February 1946, as to said T. O. Easley, and 1925, as to said Betsy Ross. That during said periods, respectively, said three properties were, and now are improved, occupied, and used, by said three named persons, respectively, for residential uses and purposes.

That Frank J. Smythe, Helen Churchward, Louise R. Taylor, and Frank Lutizetti, are, and were, when said application was made by said John D. Gregg, as aforesaid, the owners, respectively, and in possession, of four parcels of real property situated within said "Community" area, and which lies southerly and easterly of said "Critical" area, [31] and abuts upon Pendleton Street, on the westerly side thereof. That during said entire period said property has been, and now is, improved, and occupied and used, for residential uses and purposes.

That Paul C. Brown, is, and continuously since November, 1945, has been, the owner and in possession of that certain parcel of real property situated within said "Community" area, and which lies easterly and northerly of said "Critical" area, and abuts upon Pendleton Street, on the westerly side thereof. That during said period said property has been, and now is, improved and occupied and used by said Paul C. Brown, for residential uses and purposes.

That D. H. Calley, and C. C. Campbell, are, and were continuously last past since 1945, and February 1946, respectively, the owners, and in possession, of those certain two parcels of real property situ-

ated within said "Community" area, and which lie immediately northerly of said "Critical" area, and between Peoria and Wicks Street, and are shown upon said map. That during said periods said properties have been, and now are, improved, and occupied and used by said persons, respectively, for residential uses and purposes.

That W. L. Calley is, and for more than one year continuously last past has been, the owner and in possession of that certain parcel of real property situated within said "Community" area, and which lies immediately northerly of said "Critical" area, and between Peoria and Wicks Streets, and is shown upon said map, and is using, and during said entire period has used, said property for residential uses and purposes.

That Lillian Lewis, W. R. Shadley, and George J. King, are, and continuously last past for the periods since 1938 as to said Lillian Lewis; December 1936, as to said W. R. Shadley, and June 1946, as to said George J. King, respectively, have been, respectively, the owners, and in possession of those certain three parcels of real property situated within said "Community" area, and which lie northerly of said "Community Park," and abut upon Wicks Street, on the westerly [32] side thereof, as shown on said map. That during said periods, respectively, said properties have been, and now are, improved, and occupied and used by said named persons, respectively, for residential uses and purposes.

That Jackson Earl Wheeler is the owner of, and

is, and for more than five years continuously last past has been, in possession of that certain parcel of real property located at the northeast corner of Helen and Art Streets, northeasterly of said "Critical" area, and within said "Community" area, and shown upon said map. That said real property is, and during said entire period has been, occupied and used by said Jackson Earl Wheeler for residential uses and purposes.

That the property which comprises fifteen acres, and which abuts upon Wicks Street on the westerly side of said street, and immediately across said street from said "Critical" area, and which is marked "Community Park and Hall" upon said map, is, and since 1928, continuously has been, owned by the Park Department of said defendant city and under the management of the Playground Department of said defendant city. That said property and the facilities thereof are, and for more than one year immediately last past, were patronized and used by not less than 100 and sometimes by 800 persons each day, and by not less than 1000 and sometimes by 2000 persons each week.

That fourteen of the persons hereinbefore named in this numbered paragraph, during a period of two and one-half years immediately preceding October 2, 1946, the date of the grant of said variance permit, purchased and improved their said respective properties, for residential purposes, at a cost to them, in the aggregate of more than \$150,000, under the encouragement and security of said zoning regulations, and in reliance thereupon.

XXXI.

That the Planning Commission; Park Department; Playground and Recreation, and Board of Education, of said defendant city, have actively, consistently, vigorously, and publicly, opposed [33] each and every application for a variance permit to conduct operations for the commercial production of rock, sand, and gravey, within said "Community" area, and are now opposed to the conduct of such operations within or upon any lands lying within said "Community" area, either under said variance permit, or otherwise, upon the grounds, among others, that such operations would be substantially and seriously detrimental to the public welfare, health, and safety, and particularly to the health and safety of many hundreds of young children who attend the places of worship; assembly; recreation, and training, maintained within said area; would be injurious to the properties within said area which are publicly owned, maintained, and operated; would be substantially and seriously injurious to a very large number of properties in said area, in private ownership; and would destroy a substantial residential community which has been builded during a period of nearly thirty years upon public and private assurances, as herein related, that said area would be maintained and protected against any encroachment of the business of commercially producing rock, sand and gravel.

XXXII.

That resident within said "Community" area there are, and for more than five years immediately and continuously last past there has been, more than one thousand persons who are not named as plaintiffs herein, but who, in the enjoyment of their homes within said "Community" area, and in their health and safety, would be substantially, materially, and injuriously affected in kind substantially as would be these named plaintiffs, but in varying degrees of lesser frequency and intensity, from any operation for the commercial production of rock, sand, and gravel, within or upon said "Critical" area, excepting that some of the properties of said persons would not be in any danger of any encroachment of any pit which might be excavated upon said "Critical" area. That said numerous persons vigorously protest any conduct of any such operation within said "Community" area. [34]

That outside of said "Community" area, but adjacent thereto to the north, northwest, and southeast thereof, and within said "Map" area, there exists, and continuously for more than five years immediately last past there has existed, a substantial residential development, and use of property, as indicated by the numerous black squares upon said map. That the inhabitants of said area number more than 4400, and these will be substantially, materially, and injuriously, affected by said proposed operations of said John D. Gregg within and upon said "Critical" area, substantially identical in kind but with lesser frequency and intensity, as these

named plaintiffs, in the security of their persons, and in the enjoyment of their homes, excepting that none of the properties of said inhabitants will be in danger from any encroachment of any pit which may be excavated upon said "Critical" area.

XXIII.

That said "Community" area lies at any altitude of about one thousand feet, excepting that the extreme northerly and northeasterly areas thereof are fringed with low lying hills which rise in graceful contours from the plane of said "Community" area to varying elevations which at maximum are about five hundred feet higher than the elevation of the plane of said area. That said low lying hills, for more than one year continuously preceding said grant of said variance permit, under the encouragement and security of said zoning regulations, were under extensive development for the subdivision, improvement, and use, thereof, for residential uses and purposes.

That within said "Community" area, two major paved public highways, namely, Glenoaks Boulevard and Sunland Boulevard, conjoin and provide a practical, feasible, and economical, means for motor transport north, south, east, and west, to the centers of industrial and commercial activities throughout the metropolitan Los Angeles area, wherein the residents of said "Community" area may obtain profitable employment. [35]

That continuously for more than one year immediately preceding the public announcement of

said grant of said variance permit, there was, and had said variance permit been denied, there would be now, a heavy and continuing demand for residential lots within said "Critical" area, for residential, improvement and use.

That said American Legion Hall located on Sunland Boulevard, as shown upon said map, is, and for more than three years continuously last past has been, owned, occupied, and used, by American Legion Post Number 520. That said American Legion Post has, and had during said period, a membership of one hundred and twenty-five members. That immediately, to wit, on October 3, 1946, upon being informed that on the preceding day said City Council had granted said variance permit, said American Legion Post, by its letter addressed to Honorable Fletcher Bowron, as the Mayor of said defendant City, vigorously protested the grant of said variance permit as subversive of the general public welfare, health, and safety, and as particularly destructive of the welfare, health, and safety, of the inhabitants of said "Community" area. That said protest is, and ever since its making, as aforesaid, has been, a true reflection of the attitude of said American Legionnaires in respect of said variance permit.

XXXIV.

That each of said named plaintiffs, and of those numerous other owners who reside upon their properties, within said "Community" area, respectively, acquired his and their said premises, with the knowl-

edge that said "Community" area had been restricted, as herein set forth, against any extension therein of any operation for the commercial production of rock, sand, and gravel, and in the belief and in reliance thereupon, that said "Community" area would be developed, improved, and used, as a predominantly residential area, immune, and to remain immune, to any encroachment there, or thereupon, of any operation for the commercial production of rock, sand, [36] and gravel, substantially in accordance with a general policy for such improvement, development, and use, and for such restriction, in conformity with a master plan of governmental zoning substantially as established and maintained by said defendant city continuously for more than twenty-two years prior to October 2, 1946, as herein set forth.

That excepting for such knowledge, belief, and reliance, said persons would not have made their investments, respectively, in the acquisition, improvement, and use, of their said properties, as aforesaid.

That at the time when said defendant John D. Gregg acquired the lands which comprise said "Critical" area, as aforesaid, said defendants knew, and the facts were, that said named plaintiffs had acquired, improved, and used, and were, using their said premises, respectively, for residential purposes, as aforesaid, and that said defendant city, and said land company in which said defendant John D. Gregg, was, and is, president and a substantial owner, as aforesaid, had actively encouraged said

named plaintiffs so to do, by their conduct as herein set forth.

XXXV.

That the lands lying within, and which constitute, said "Critical" area, are substantially the same in the structure and placement of the materials of which they are composed, and in their top soil condition, and in their surface contour, as the lands of those named plaintiffs, and of all others similarly situated, as herein set forth.

XXXVI.

That said defendant John D. Gregg, threatens to, and will, unless restrained by the order or judgment of the Court herein, enter upon said lands within said "Critical" area, and excavate thereon, or therein, for the commercial production of rock, sand and gravel.

That in execution of said threat said John D. Gregg, since the grant of said variance permit on October 2, 1946, and notwithstanding [37] the notice served upon him, as aforesaid, has made an extensive excavation upon his own land lying immediately southerly of Glenoaks Boulevard, as hereinbefore alleged, and, in extension thereof, has excavated extensively upon and beneath said Glenoaks Boulevard, opposite and up to said "Critical" area, and has installed within said excavations a large metal pipe within which he proposes to operate the belt conveyor by which he proposes to convey the materials which he threatens to excavate and primarily crush upon or within said "Critical"

area, under said variance permit, to the processing plant which he maintains and operates upon the property which he owns southerly from said "Critical" area, and from said Glenoaks Boulevard, as aforesaid, and has actually begun to excavate, and is now excavating, within and upon said "Critical" area, for the commercial production of rock, sand, and gravel, by means of an electrically powered six ton shovel, and is transporting said materials to his said processing plant southerly of said "Community" area, as aforesaid, for commercial processing for the market.

That the "primary crusher" referred to in condition number 2 in the statement of the conditions upon which said variance permit was granted, as set forth in paragraph XXI hereof, and which "primary crusher" said John D. Gregg threatens to use, and must and will use, in any operation for the commercial production of rock, sand and gravel, under said variance permit, within or upon the lands which comprise said "Critical" area, is a powerful crushing mechanism constructed of metal which is necessarily and customarily used in such an operation, for the purpose of crushing into many smaller units at the place of excavation, the numerous boulders encountered in such excavation, which, in size and weight, are too large and heavy, without such crushing, for economical, feasible, and practical, transportation from the place of their occurrence to the processing plant of the operator.

That such crushing operations will produce land, crunching, [38] rasping, and obnoxious noises, and

substantial quantities of dust and dirt, which will be carried by the winds within said "Community" area, to the homes of the inhabitants of said "Community" area, and to the school, churches, and other places of public and private assembly within said "Community" area, as herein alleged, and will substantially and materially interfere with, interrupt, and impair, the comfortable enjoyment of their homes and of said other places of assembly, within said "Community" area, by the inhabitants thereof.

That a substantial part of said offensive dust and dirt will consist of a granular silica in powdery form, which, upon being inhaled by the inhabitants of said area, and particularly by children of tender years, is conducive to the development and aggravation of tuberculosis and other respiratory and pulmonary afflictions.

That a "screen planting" upon the margins of said "Critical" area, as required conditionally within said variance permit, would be a sham and a farce. It would not prevent, it would invite, the exploration of the tangled growth upon the brink of the deep and dangerous pit by innumerable children of tender years who reside within said "Community" area, or, otherwise, who visit the many places of worship, recreation, training, and public assembly, provided within said "Community" area, and by its tendency to conceal the grave dangers, otherwise obvious, and unavoidably incident to the maintenance of such a pit in such a community, said "screen planting" would substantially contrib-

ute to the death and injury of children in said "Community" area.

XXXV.

That said conduct of said defendant city in the grant of said variance permit in the purported exercise of its police power in respect of the zoning of said "Community" area, is unreasonable and oppressive, as to each of the properties, property owners, and residents, within said "Community" area, and was and is in excess of the just limits of its police power, and is in violation of Article 1, Section 21, of the Constitution of the State of California, and of the 5th and 14th Amendments to the Constitution of the United States of America.

XXXVI.

That said conduct of said defendant city in the purported exercise of its police power in respect of the zoning of said "Community" area, wherein it granted said variance permit to said defendant John D. Gregg, constitutes a taking of the properties of these named plaintiffs, and of all others similarly situated within said "Community" area, without any public necessity therefor, and without just compensation to said persons, or to any of them, in violation of the constitution of the State of California, and of the Fifth and Fourteenth Amendments to the Constitution of the United States of America, and is void.

XXXVII.

That said conduct of said defendant city, in the purported exercise of its police power, as aforesaid,

wherein it granted said variance permit to said defendant John D. Gregg, is, and was, an unjust, oppressive, and arbitrary, exercise of its police power, and is an unwarranted invasion and confiscation of the properties, and property rights, of those named plaintiffs, and a violation of the Fifth and Fourteenth Amedments to the Constitution of the United States, and is void.

XXXVIII.

That the conduct of said defendant city, in the purported exercise of its police power, as aforesaid, bears no relation to the ends for which the police power exists, but is a clear and deliberate invasion under the guise of the police power, of the personal and property rights of these named plaintiffs.

XXXIX.

That the real purpose of the eleven members of the City [40] Council of said defendant city, who voted for the grant of said variance permit, and by whose votes said permit was granted, was not to protect the public welfare, health, or safety, or to promote any objective of any just or permissible exercise of the police power of said defendant city, but was for the purpose of preferring said John D. Gregg as against all other property owners within said "Community" area, in the use and enjoyment of their properties within said area, respectively, and to enable said John D. Gregg to vastly expand his operations of producing rock, sand, and gravel, commercially, by the use of his facilities therefore, now maintained by him upon a tract of land comprising about sixty two and one half acres, situated

within said M-3 zone adjoining said "Community" area to the south, as aforesaid, and of which land only about 35 acres have been excavated, without the necessity or expense of removing his said facilities to a different location in order to expand his ownership of lands upon which, by the use of said processing facilities, he could engage in the commercial production of rock, sand, and gravel.

That the strict and literal interpretation and enforcement of the provisions of said zoning laws as to the lands within said "Community" area, including the lands which comprise said "Critical" area, would not produce, or accentuate, any practical difficulties, unnecessary hardships, or results inconsistent with the general purposes of said zoning laws, in relation to said defendant John D. Gregg, or otherwise.

XXXX.

That if operations for the commercial production of rock, sand, and gravel, are extended to, and conducted within, or upon any of the lands lying within said "Critical" area, and within the provisions of, said variance permit, the enjoyment by these named plaintiffs and of others similarly situated in said "Community" area, of their said homes and properties within said "Community" area, will be substantially, materially and seriously, disturbed, interfered [41] with, interrupted, and diminished, immediately, and that the injuries and damage arising therefrom will progressively expand as such operations are extended upon, or within, said "Critical" area, and that by reason thereof these

plaintiffs, and all other persons similarly situated within said area, would be substantially and irreparably damaged.

XXXXI.

That if operations for the commercial production of rock, sand, and gravel, are extended to, and conducted within or upon the lands lying within said "Critical" area, under and within the provisions of said variance permit, the actual value, and the reasonable market value, of the properties, respectively, of these named plaintiffs and of all others similarly situated with said "Community" area, located within said "Community" area, as herein described, will be immediately, substantially, and materially, depreciated, and progressively, as such operations continue, will be substantially destroyed, and that thereby these named plaintiffs and all others similarly situated within said "Community" area, will be irreparably and permanently damaged.

XXXXII.

That said defendant John D. Gregg, by his conduct as herein set forth, is estopped to claim or exercise any right, privilege, or benefit, under said variance permit, or to conduct any operations within or upon the lands which comprise said "Critical" area, for the commercial production of rock, sand, or gravel.

XXXXIII.

That said defendant city by its conduct, as herein set forth, is estopped to grant said variance permit, or to permit said John D. Gregg to exercise or enjoy any benefit, right, or privilege, under said variance

permit, or to authorize or permit any extension of any operation for the commercial production of rock, sand, or gravel, into said "Community" area, or within or upon any of the lands located [42] within said "Community" area, or within said "Critical" area.

XXXXIV.

That in the circumstances herein alleged, right and justice demand that in order to prevent manifest wrong and injustice to these plaintiffs, as herein set forth, said defendant city be permanently enjoined from authorizing, or permitting said John D. Gregg, or anyone, to conduct any operation for the commercial production of rock, sand, or gravel, within or upon any lands located within said "Community" area, and that said grant of a variance permit to said John D. Gregg to conduct such operations within said area be declared void as an act in excess of any reasonable exercise of the police power of said defendant city, and that said defendant John D. Gregg be permanently enjoined from exercising any right or privilege which derives from said purported grant of a variance permit.

XXXXV.

That by reason of the conduct of said defendant John D. Gregg, as aforesaid, the occupancy by these named plaintiffs, of their homes, respectively, has been, and is, rendered substantially and materially uncomfortable, and their enjoyment of their homes and properties, respectfully, has been, and is, substantially, materially, and grievously, interfered with and impaired, and the reasonable market

value of their respective properties has been substantially depreciated, and that by reason thereof each of these named plaintiffs has been damaged in a sum in excess of three thousand dollars, and that said injury and damage is a continuing tangible injury and damage, and that a monetary evaluation thereof is and will continue to be, materially higher each ensuing day during which said defendant John D. Gregg is permitted to conduct said operations under said permit. That no part of said damages has been paid, or in any manner satisfied, and the whole thereof is owing and unpaid. [43]

XXXXVI.

That plaintiffs do not have any plain, adequate, or speedy remedy at law.

Wherefore, plaintiffs pray that:

(1) the action of said defendant City in granting said variance permit, and said variance permit, be declared void, and of no force, virtue, or effect, in law or in equity;

(2) that said defendant City be enjoined from granting or undertaking to grant, any variance permit under existing zoning laws, for the conduct of and from permitting any operation upon or within any lands situated within said "Community" area, for the commercial production of rock, sand, and gravel;

(3) that said John D. Gregg be enjoined from exercising any right, benefit, or privilege, under said variance permit, and from conducting any operation for the commercial production of rock, sand, and gravel, within, or upon, any of the lands situated

within said "Critical" area, or within said "Community" area;

(4) that each of said defendants be preliminarily restrained from doing anything as to which their permanent restraint is herein sought;

(5) that plaintiffs have and recover from said defendant John D. Gregg, their actual damages accrued up to the date of judgment herein, as the same may be determined upon the trial hereof;

(6) that plaintiffs have such other and further relief as to the court shall seem equitable, and for costs of suit.

/s/ OLIVER O. CLARK,

/s/ ROBERT A. SMITH,

Attorneys for Plaintiffs. [44]

State of California,

County of Los Angeles—ss.

John Albert McCullough, being by me first duly sworn, deposes and says: That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing Complaint in Equity for Injunction and for Damages and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ JOHN ALBERT McCULLOUGH.

Subscribed and sworn to before me this 14th day of November, 1947.

[Seal] /s/ DAVID D. LALLEE,

Notary Public in and for said
County and State. [45]

DEVELOPMENT

INVOLVED AREA

OCTOBER 1954 SCALE 1:500

HENRY J. WILSON
CONSULTING ENGINEER

LEGEND

- ◻ UNIMPROVED HOME
- ◻ IMPROVED HOME
- ◻ UNIMPROVED BUSINESS BUILDING
- ◻ IMPROVED BUSINESS BUILDING
- ◻ UNIMPROVED INDUSTRIAL BUILDING
- ◻ IMPROVED INDUSTRIAL BUILDING
- ◻ UNIMPROVED GARAGE
- ◻ IMPROVED GARAGE
- ◻ UNIMPROVED DRIVE
- ◻ IMPROVED DRIVE
- ◻ UNIMPROVED SIDEWALK
- ◻ IMPROVED SIDEWALK
- ◻ UNIMPROVED CURB
- ◻ IMPROVED CURB
- ◻ UNIMPROVED STREET LIGHT
- ◻ IMPROVED STREET LIGHT
- ◻ UNIMPROVED SIGN
- ◻ IMPROVED SIGN
- ◻ UNIMPROVED FENCE
- ◻ IMPROVED FENCE
- ◻ UNIMPROVED UTILITY POLE
- ◻ IMPROVED UTILITY POLE
- ◻ UNIMPROVED UTILITY WIRE
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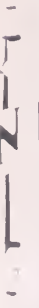


EXHIBIT B

ORDINANCE No. 90,500

An Ordinance amending Articles 2, 3, 4, 5 and 6, Chapter 1 of the Los Angeles Municipal Code; amending Sec. 32.06.1, Sec. 34.04, Sec. 34.15 and Sec. 36.11, Chapter 3 of said Code; amending Sec. 57.55 and Sec. 57.64, Chapter 5 of said Code; amending Sec. 67.03 and Sec. 67.15, Chapter 6 of said Code; amending Sec. 91.1601, Sec. 91.1702 and Sec. 91.4802, Chapter 9 of said Code; and amending Ordinance No. 79,752.

The People of the City of Los Angeles do ordain as follows:

Section 1. That Article 2 of Chapter 1 of the Los Angeles Municipal Code (Ordinance No. 77,000 as amended) be, and the same is hereby amended in its entirety so as to read as follows:

CHAPTER 1—ZONING

Article 2—Comprehensive Zoning Plan

Sec. 12.00—Title

This Article shall be known as the “Comprehensive Zoning Plan of the City of Los Angeles.”

Sec. 12.01—Continuation of Existing Regulations

The provisions of this Article, in so far as they are substantially the same as existing ordinances relating to the same subject matter, shall be construed as restatements and continuations and not as new enactments.

Sec. 12.02—Purpose

The purpose of this Article is to consolidate and coordinate all existing zoning regulations and provisions into one comprehensive zoning plan in order to designate, regulate and restrict the location and use of buildings, structures and land, for agriculture, residence, commerce, trade, industry or other purposes; to regulate and limit the height, number of stories, and size of buildings and other structures, hereafter erected or altered; to regulate and determine the size of yards and other open spaces; and to regulate and limit the density of population; and for said purposes to divide the City into zones of such number, shape and area as may be deemed best suited to carry out these regulations and provide for their enforcement. Further, such regulations are deemed necessary in order to encourage the most appropriate use of land; to conserve and stabilize the value of property; to provide adequate open spaces for light and air, and to prevent and fight fires; to prevent undue concentration of population; to lessen congestion on streets; to facilitate adequate provisions for community utilities and facilities such as transportation, water, sewerage, schools, parks and other public requirements; and to promote health, safety, and the general welfare, all in accordance with a comprehensive plan.

Sec. 12.03—Definitions

For the purpose of Articles 2 to 6 inclusive of this Chapter, certain terms and words are herewith defined as follows:

Accessory Building—A portion of the main building or a detached subordinate building located on the same lot, the use of which is customarily incident to that of the main building or to the use of the land. Where a substantial part of the wall of an accessory building is a part of the wall of the main building or where an accessory building is attached to the main building in a substantial manner by a roof, such accessory building shall be counted as part of the main building.

Accessory Living Quarters—Living quarters within an accessory building located on the same premises with the main building, for the sole use of persons employed on the premises; such quarters having no kitchen facilities and not rented or otherwise used as a separate dwelling.

Administrator—Shall mean the “Zoning Administrator.”

Apartment Hotel—A building or portion thereof designed for or containing both individual guest rooms or suites of rooms and dwelling units.

Apartment House—Same as “Dwelling, Multiple.”

Automobile and Trailer Sales Area—An open area, other than a street, used for the display, sale or rental of new or used automobiles or trailers, and where no repair work is done except minor incidental repair of automobiles or trailers to be displayed, sold or rented on the premises.

Automobile Wrecking — The dismantling or wrecking of used motor vehicles or trailers, or the

storage, sale or dumping of dismantled, partially dismantled, obsolete or wrecked vehicles or their parts.

Basement—A story partly or wholly underground. A basement shall be counted as a story for purposes of height measurement where more than one-half of its height is above the average level of the adjoining ground.

Board—Shall mean the “Board of Zoning Appeals.”

Boarding House—A building with not more than five (5) guest rooms where lodging and meals are provided for compensation.

Building—Any structure having a roof supported by columns or wall for the housing or enclosure of persons, animals or chattels. Where dwellings are separated from each other by a division wall without openings, each portion of such dwelling shall be deemed a separate building.

Building, Height of—The vertical distance measured from the adjoining curb level, to the highest point of ceiling of the top story in the case of a flat roof; to the deck line of a mansard roof; and to mean height level between eaves and ridge of a gable, hip or gambrel roof; provided, however, that where buildings are set back from the street line, the height of the building may be measured from the average elevation of the finished lot grade at the front of the building.

Camp, Public—Any area or tract of land used or designed to accommodate two (2) or more automo-

bile house trailers, or two (2) or more camping parties, including cabins, tents or other camping outfits.

Camp, Trailer—Same as “Camp, Public.”

Cemetery—Land used or intended to be used for the burial of the dead and dedicated for cemetery purposes, including columbariums, crematories, mausoleums and mortuaries when operated in conjunction with and within the boundary of such cemetery.

Commission—Shall mean the “City Planning Commission.”

Court—An open unoccupied space, other than a yard, on the same lot with a building and bounded on two (2) or more sides by such building.

Court Apartment—One, two or three multiple dwellings arranged around two (2) or three (3) sides of a court which opens onto a street, or a place approved by the Commission.

Curb Level—The level of the established curb in front of the building measured at the center of such front. Where no curb level has been established, the City Engineer shall establish such curb level or its equivalent for the purpose of this Article.

Dwelling—A building or portion thereof designed exclusively for residential occupancy, including one-family, two-family and multiple dwellings, but not including hotels, boarding and lodging houses.

Dwelling Unit—Two or more rooms in a dwelling or apartment hotel designed for occupancy by one family for living or sleeping purposes and having only one (1) kitchen.

Dwelling, One-Family—A detached building designed exclusively for occupancy by one (1) family.

Dwelling, Two-Family—A building designed exclusively for occupancy by two (2) families living independently of each other.

Dwelling, Multiple—A building or portion thereof designed for occupancy by three (3) or more families living independently of each other.

Dwelling Group—One or more buildings, not more than two and one-half ($2\frac{1}{2}$) stories in height, containing dwelling units and arranged around two (2) or three (3) sides of a court which opens onto a street, or a place approved by the Commission, including one-family, two-family, row or multiple dwellings and court apartments.

Dwelling, Row—A row of three (3) to six (6) attached one-family dwellings, not more than two and one-half ($2\frac{1}{2}$) stories in height, nor more than two (2) rooms deep.

Educational Institutions—Colleges or universities supported wholly or in part by public funds and other colleges or universities giving general academic instruction, as prescribed by the State Board of Education.

Family—An individual, or two (2) or more persons related by blood or marriage, or a group of not more than five (5) persons (excluding servants) who need not be related by blood or marriage, living together as a single housekeeping unit in a dwelling unit.

Frontage—All the property fronting on one (1) side of a street between intersecting or intercepting

streets, or between a street and right-of-way, waterway, end of dead-end street, or city boundary measured along the street line. An intercepting street shall determine only the boundary of the frontage on the side of the street which it intercepts.

Garage, Private—A detached accessory building or portion of a main building for the parking or temporary storage of automobiles of the occupants of the premises.

Garage, Public—A building other than a private garage used for the care, repair, or equipment of automobiles, or where such vehicles are parked or stored for remuneration, hire or sale.

Guest House—Living quarters within a detached accessory building located on the same premises with the main building, for use by temporary guests of the occupants of the premises; such quarters having no kitchen facilities and not rented or otherwise used as a separate dwelling.

Home Occupation—An occupation carried on by the occupant of a dwelling as a secondary use in connection with which there is no display; no stock in trade nor commodity sold upon the premises; no person employed; and no mechanical equipment used except such as is necessary for housekeeping purposes.

Hotel—A building designed for occupancy as the more or less temporary abiding place of individuals who are lodged with or without meals, in which there are six (6) or more guest rooms, and in which no provision is made for cooking in any individual room or suite.

Kennel—Any lot or premises on which four (4) or more dogs, at least four (4) months of age, are kept.

Loading Space—An off-street space or berth on the same lot with a building, or contiguous to a group of buildings, for the temporary parking of a commercial vehicle while loading or unloading merchandise or materials, and which abuts upon a street, alley or other appropriate means of access.

Lodging House—A building with not more than five (5) guest rooms where lodging is provided for compensation.

Lot—Land occupied or to be occupied by a building or unit group of buildings and accessory buildings, together with such yards, open spaces, lot width and lot area as are required by this Article, and having frontage upon a street, or a place approved by the Commission.

Lot Line, Front—In the case of an interior lot, a line separating the lot from the street or place; and in the case of a corner lot, a line separating the narrowest street frontage of the lot from the street, except in those cases where the latest tract deed restrictions specify another line as the front lot line.

Lot Line, Rear—A lot line which is opposite and most distant from the front lot line and, in the case of an irregular, triangular or gore-shaped lot, a line ten (10) feet in length within the lot, parallel to and at the maximum distance from the front lot line.

Lot Line, Side—Any lot boundary line not a front lot line or a rear lot line.

Lot Width—The horizontal distance between the side lot lines measured at right angles to the lot depth at a point midway between the front and rear lot lines.

Lot Depth—The horizontal distance between the front and rear lot lines measured in the mean direction of the side lot lines.

Lot Area—The total horizontal area within the lot lines of a lot.

Lot, Corner—A lot not greater than seventy-five (75) feet in width and situated at the intersection of two (2) or more streets having an angle of intersection of not more than one hundred thirty-five (135) degrees.

Lot, Reversed Corner—A corner lot the side street line of which is substantially a continuation of the front lot line of the lot to its rear.

Lot, Interior—A lot other than a corner lot.

Lot, Key—The first interior lot to the rear of a reversed corner lot and not separated by an alley.

Lot, Through—A lot having frontage on two (2) parallel or approximately parallel streets.

Nonconforming Building—A building or structure or portion thereof lawfully existing at the time this Article became effective, which was designed, erected or structurally altered, for a use that does not conform to the use regulations of the zone in which it is located, or a building or structure that does not conform to all the height and area regulations of the zone in which it is located.

Nonconforming Use—A use which lawfully occupied a building or land at the time this Article be-

came effective and which does not conform with the use regulations of the zone in which it is located.

Parking Area, Public—An open area, other than a street, used for the temporary parking of more than four (4) automobiles and available for public use whether free, for compensation or as an accommodation for clients or customers.

Parking Space, Automobile—Space within a public parking area or a building, exclusive of driveways, ramps, columns, office and work areas, for the temporary parking or storage of one (1) automobile.

Rentable Floor Area—The floor area in a building, exclusive of corridors, stairs, elevator shafts, lavatories, flues and janitors' storage closets.

Schools, Elementary and High—An institution of learning which offers instructions in the several branches of learning and study required to be taught in the public schools by the Education Code of the State of California. High schools include Junior and Senior.

Stable, Private—A detached accessory building for the keeping of horses owned by the occupants of the premises and not kept for remuneration, hire or sale.

Stable, Public—A stable other than a private stable.

Story—That portion of a building included between the surface of any floor and the surface of the floor next above it, or if there be no floor above it, then the space between such floor and the ceiling next above it. Any portion of a story exceeding

fourteen (14) feet in height shall be considered as an additional story for each fourteen (14) feet or fraction thereof.

Story, Half—A story with at least two (2) of its opposite sides situated in a sloping roof, the floor area of which does not exceed two-thirds ($\frac{2}{3}$) of the floor area immediately below it.

Structure—Anything constructed or erected, which requires location on the ground or attached to something having a location on the ground.

Structural Alterations—Any change which would prolong the life of the supporting members of a building or structure, such as bearing walls, columns, beams or girders.

Tourist Court—A group of attached or detached buildings containing individual sleeping or living units, designed for or used temporarily by automobile tourists or transients, with garage attached or parking space conveniently located to each unit, including auto courts, motels, or motor lodges.

Trailer, Automobile—A vehicle without motive power, designed to be drawn by a motor vehicle and to be used for human habitation or for carrying persons and property, including a trailer coach or house trailer.

Use—The purpose for which land or a building is arranged, designed or intended, or for which either land or a building is or may be occupied or maintained.

Yard—An open space other than a court, on a lot, unoccupied and unobstructed from the ground upward, except as otherwise provided in this Article.

Yard, Front—A yard extending across the full width of the lot, the depth of which is the minimum horizontal distance between the front lot line and a line parallel thereto on the lot.

Yard, Rear—A yard extending across the full width of the lot between the most rear main building and the rear lot line. The depth of the required rear yard shall be measured horizontally from the nearest part of a main building toward the nearest point of the rear lot line.

Yard, Side—A yard, more than six (6) inches in width, between a main building and the side lot line, extending from the front yard, or front lot line where no front yard is required, to the rear yard. The width of the required side yard shall be measured horizontally from the nearest point of the side line toward the nearest part of the main building.

Sec. 12.04—Zones

In order to carry out the purpose and provisions of this Article the City is hereby divided into sixteen (16) zones, known as:

“A1”	Agricultural Zone
“A2”	Agricultural Zone
“RA”	Suburban Zone
“R-1”	One-family Zone
“R2”	Two-family Zone
“R3”	Multiple Dwelling Zone
“R4”	Multiple Dwelling Zone
“R5”	Multiple Dwelling Zone

“C1”	Limited Commercial Zone
“C2”	Commercial Zone
“C3”	Commercial Zone
“C4”	Commercial Zone
“CM”	Business Zone
“M1”	Limited Industrial Zone
“M2”	Light Industrial Zone
“M3”	Heavy Industrial Zone

The Zones aforesaid and the boundaries of such Zones are shown upon a map attached hereto and made a part of this Article, being designated as the “Zoning Map” and said map and all the notations, references and other information shown thereon shall be as much a part of this Article as if the matters and information set forth by said map were all fully described herein.

For Oil Drilling Districts and Regulations, see Article 3, Chapter 1, Los Angeles Municipal Code.

Sec. 12.05—“A1” Agricultural Zone

The following regulations shall apply in the “A1” Agricultural Zone:

A. Use—No building, structure or land shall be used and no building or structure shall be hereafter erected, structurally altered, enlarged, or maintained, except for the following uses:

1. One-family dwellings.
2. Churches, and non-profit libraries and museums, provided they are located at least twenty-five (25) feet from all lot lines.
3. Hospitals or sanitariums, including animal hospitals as set forth in Paragraph 10 (b) of this

Subsection (but excepting clinics, and hospitals or sanitariums for contagious, mental, or drug or liquor addict cases), provided they are located at least fifty (50) feet from all lot lines.

4. Parks, playgrounds or community centers, owned and operated by a governmental agency.

5. Golf courses; except driving tees or ranges, miniature courses and similar uses operated for commercial purposes.

6. Agricultural uses, including field crops; truck gardening; berry or bush crops; tree crops; flower gardening; nurseries; orchards; avaries; apiaries; and mushroom farms.

7. Farms devoted to the hatching, raising and marketing of chickens, turkeys, or other poultry, fowl, rabbits, fish or frogs; provided, however, that no killing or dressing of poultry or rabbits shall be permitted other than the poultry or rabbits raised on the premises and that such killing or dressing is done in an accessory building.

8. Farms or ranches for grazing, breeding, raising or training horses or cattle; riding stables or academies; goat or cattle dairies on a lot having an area of not less than twenty (20) acres; sheep or goat raising; the keeping of not to exceed five (5) swine, subject to provisions of Sec. 34.04, Los Angeles Municipal Code; dog kennels or the breeding, boarding or sale of dogs or cats; aquariums; and alligator, ostrich, mink or fox farms.

9. Any other similar uses or enterprises customarily carried on in the field of general agriculture and not obnoxious or detrimental to the public welfare.

10. The following uses may also be permitted if their location is first approved by the Commission or Administrator:

(a) Commission—Uses which may be permitted by the Commission as provided for in Sec. 12.24-A, include: airports or aircraft landing fields; cemeteries; educational institutions; schools, elementary and high; and public utilities and public service uses or structures.

(b) Administrator—Uses which may be permitted by the administrator as provided for in Sec. 12.25-A, include: philanthropic or correctional institutions; animal hospitals; cattle feed or sales yards; circus quarters or menageries; goat or cattle dairies on a lot having an area of less than twenty (20) acres; and the keeping of more than five (5) swine.

Provided, further, that institutions and hospitals shall be located at least fifty (50) feet from all lot lines.

11. Uses customarily incident to any of the above uses, including home occupations or the office of a physician, dentist, or minister of religion.

12. Accessory buildings, including a private garage, accessory living quarters, guest house, recreation room, greenhouse, lathhouse, stable, barn, corral, pen, coop, kennel, poultry or rabbit killing and dressing room, building or room for packing products raised on the premises, or other similar structure, when located not less than one hundred (100) feet from the front lot line nor less than twenty-five

(25) feet from any other lot line. Accessory living quarters, guest house, recreation room, and a private garage or any combination of such uses may be included in one (1) building of one (1) or two (2) stories in height.

13. One stand for the display and sale of only those products produced upon the same premises, provided that the plan for the construction of such stand is approved by the Department of Building and Safety; that it does not exceed an area of two hundred (200) square feet; and that it is located not nearer than ten (10) feet to any street or highway.

14. Name plates and signs as follows: one name plate for each dwelling unit, not exceeding three (3) square feet in area, indicating the name of the occupant of a permitted occupation; one identification sign, not exceeding twenty (20) square feet in area, for farms, ranches, estates, or buildings other than dwellings; one church bulletin board not exceeding eighteen (18) square feet in area; single or double-faced unlighted sign or signs, appertaining only to the prospective rental or sale of the property on which it is located or to the farm products produced upon the premises, provided such signs do not exceed a total of twenty (20) square feet in area and are located not nearer than ten (10) feet to any street or highway; and one or more signs, not exceeding three (3) square feet in area, warning against trespassing.

B. Height—No building or structure nor the enlargement of any building or structure shall be

hereafter erected or maintained to exceed two and one-half (2½) stories or thirty-five (35) feet in height.

Exceptions to Height regulations are provided for in Sec. 12.22-B.

C. Area—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained unless the following yards and lot areas are provided and maintained in connection with such building, structure or enlargement:

1. Front Yard—There shall be a front yard of not less than twenty (20) per cent of the depth of the lot, but such front yard need not exceed twenty-five (25) feet.

2. Side Yard—There shall be a side yard on each side of a main building of not less than ten (10) per cent of the width of the lot, but such side yard need not exceed twenty-five (25) feet and shall not be less than three (3) feet in width.

3. Rear Yard—There shall be a rear yard of not less than twenty-five (25) per cent of the depth of the lot, but such rear yard need not exceed twenty-five (25) feet.

4. Lot Area—Every lot, farm or other parcel of land shall have a minimum average width of three hundred (300) feet and a minimum area of five (5) acres for all uses permitted in this Section, except that (a) the lot area for goat or cattle dairies shall be not less than twenty (20) acres, (b) the lot area per dwelling unit shall be not less than two and one-half (2½) acres, and (c) churches, libraries, museums, public utility and public service uses or struc-

tures, and sanitariums or hospitals (except animal) not exceeding fifty (50) beds, may be located on a lot of not less than two (2) acres.

In no case shall a farm or other parcel of land be reduced to less than five (5) acres (except for those uses set forth in (c) of this Paragraph). Provided, that where a lot has less width or less area than herein required and was held under separate ownership or was on record at the time this Article became effective, such lot may be occupied by any use permitted in this Section, except for those used set forth in Paragraphs 5 and 8, Subsection A of this Section.

Exceptions to Area regulations are provided for in Sec. 12.22-C.

Sec. 12.06—"A2" Agricultural Zone

The following regulations shall apply in the "A2" Agricultural Zone.

A. Use—No building, structure or land shall be used and no building or structure shall be hereafter erected, structurally altered, enlarged, or maintained, except for the following uses:

1. Any use permitted in the "A1" Zone. Provided, however, that the following uses, when located in the "A2" Zone, shall comply with all the regulations of the "A1" Zone:

(a) Farms or ranches for grazing, breeding, or training horses or cattle; riding stables or academies; goat or cattle dairies on a lot having an area of not less than twenty (20) acres; sheep or goat raising; the keeping of not to ex-

ceed five (5) swine, subject to provisions of Sec. 34.04, Los Angeles Municipal Code; dog kennels or the breeding, boarding or sale of dogs or cats; aquariums; and alligator, ostrich, mink or fox farms.

(b) Hospitals or sanitariums, including animal hospitals as set forth in Paragraph 2 (b) of this Subsection (but excepting clinics and hospitals or sanitariums for contagious, mental, or drug or liquor addict cases), provided they are located at least fifty (50) feet from all lot lines.

2. The following cases may also be permitted if their location is first approved by the Commission or Administrator:

(a) Commission—Uses which may be permitted by the Commission as provided for in Sec. 12.24-A, include: airports or aircraft landing fields; cemeteries; educational institutions; schools, elementary and high; and public utilities and public service uses or structures.

(b) Administrator—Uses which may be permitted by the Administrator as provided for in Sec. 12.25-A, include: philanthropic or correctional institutions; animal hospitals; cattle feed or sales yards; circus quarters or menageries; goat or cattle dairies on a lot having an area of less than twenty (20) acres; and the keeping of more than five (5) swine.

Provided, further, that institutions and hospitals shall be located at least fifty (50) feet from all lot lines.

B. Height—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained to exceed two and one-half ($2\frac{1}{2}$) stories or thirty-five (35) feet in height.

Exceptions to Height regulations are provided for in Sec. 12.22-B.

C. Area—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained unless the following yards and lot areas are provided and maintained in connection with such building, structure or enlargement:

1. Yards—Front, side and rear, same as required in “A1” Zone—Sec. 12.05-C.

2. Lot Area—Every lot, farm or other parcel of land shall have a minimum average width of one hundred-fifty (150) feet and a minimum area of two (2) acres for all uses permitted in this Section except (a) as otherwise required in Subsection A of this Section, (b) that sanitariums or hospitals (except animal) not exceeding fifty (50) beds, may be located on a lot of not less than two (2) acres, and (c) that the lot area per dwelling unit shall be not less than one (1) acre.

In no case shall a farm or other parcel of land be reduced to less than two (2) acres. Provided, that where a lot has less width or less area than herein required and was held under separate ownership or was of record at the time this Article became effective, such lot may be occupied by any use per-

mitted in this Section, except for those uses requiring five (5) or twenty (20) acres, as set forth in Subsection A of this Section.

Exceptions to Area regulations are provided for in Sec. 12.22-C.

Sec. 12.07—"RA" Suburban Zone

The following regulations shall apply in the "RA" Suburban Zone:

A. Use—No building, structure or land shall be used and no building or structure shall be hereafter erected, structurally altered, enlarged, or maintained, except for the following uses:

1. Any use permitted in the "A1" and "A2" Zones, provided that all regulations of said zones are complied with, except that goat or cattle dairies, riding stables or academies, and dog kennels or the breeding, boarding or sale of dogs or cats may only be permitted as set forth in Paragraph 2 of this Subsection. In the case of the following uses, however, the area regulations subsequently set forth in this Section shall apply:

(a) One-family dwellings.

(b) Churches; (except rescue missions or temporary revival), and non-profit libraries and museums with yards as required in Sec. 12.21-C, 3.

(c) Parks, playgrounds or community centers, owned and operated by a governmental agency.

(d) Golf courses; except driving tees or ranges, miniature courses and similar uses operated for commercial purposes.

(e) Farming and truck gardening, including nurseries; the hatching and raising of poultry and fowl (except commercial hatcheries); the raising of rabbits, bees, and the like; the keeping of domestic animals as an incidental use; and the sale of products or commodities raised on the premises, if no retail stand or commercial structure is maintained.

(f) Transitional uses shall be permitted in the "RA" Zone where the side of a lot abuts upon a lot in a commercial or industrial zone, provided such transitional use does not extend more than one hundred (100) feet from the boundary of the less restricted zone which it adjoins, as follows:

(1) Two-family dwelling with the same yard requirements as in the "R2" Zone and a minimum lot area of ten thousand (10,000) square feet per dwelling unit.

(2) Public Parking area when located and developed as required in Sec. 12.21-A, 6.

2. The following uses may also be permitted if their location is first approved by the Administrator as provided for in Sec. 12.25-A; philanthropic or correctional institutions; animal hospitals; cattle feed or sales yards; circus quarters, or menageries; goat or cattle dairies; riding stables or academies; the keeping of more than five (5) swine and dog kennels or the breeding, boarding or sale of dogs or cats.

3. Uses customarily incident to any of the above uses, including home occupations or the office of a physician, dentist or minister of religion.

4. Accessory buildings, including a private garage, accessory living quarters, guest house, recreation room, greenhouse, bathhouse, or a private stable, provided such stable is located on a lot having an area of not less than ten thousand (10,000) square feet and its capacity does not exceed one (1) horse for each five thousand (5000) square feet of lot area. Detached accessory buildings shall be located not less than seventy (70) feet from the front line, nor less than five (5) feet from any other street line except in the case of a stable which shall be located not less than twenty-five (25) feet from any other street line. Accessory living quarters, guest house, recreation room and a private garage or any combination of such uses may be included in one building of one (1) or two (2) stories in height, provided that the portion of such building designed for accessory living quarters, guest house or recreation room is located not nearer than five (5) feet to any lot line.

5. Automobile parking space required on lots of less than two (2) acres, including private garages for dwellings and parking space for buildings other than dwellings, as provided for in Sec. 12.21-A, 4.

6. Name plates and signs—Same as “A-1” Zone, Sec. 12.05-A, 14.

B. Height—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained to exceed two and one-

half ($2\frac{1}{2}$) stories or thirty-five (35) feet in height.

Exceptions to Height regulations are provided for in Sec. 12.22-B.

C. Area—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained unless the following yards and lot areas are provided and maintained in connection with such building, structure or enlargement:

1. Front Yard—There shall be a front yard of not less than twenty (20) per cent of the depth of the lot, but such front yard need not exceed twenty-five (25) feet. Provided, however, that where lots comprising forty (40) per cent or more of the frontage (excluding key and reversed corner lots) are developed with buildings having front yards with a variation of not more than ten (10) feet in depth, the average of such front yards shall establish the front yard depth for the entire frontage. In determining such front yard depth, buildings located entirely on the rear one-half of a lot shall not be counted.

On key lots the minimum front yard shall be the average of the required front yard for the adjoining interior lot and the required side yard along the street side of the adjoining reversed corner lot. Where existing buildings on either or both of said adjoining lots are located nearer to the front or side lot lines than the yards required above, the yards established by such existing buildings shall be used in computing the front yard for a key lot.

In no case shall a front yard of more than fifty (50) feet be required.

2. Side Yards—On interior lots there shall be a side yard on each side of a main building of not less than ten (10) per cent of the width of the lot, but such side yard need not exceed five (5) feet and shall not be less than three (3) feet in width.

On corner lots the side yard regulations shall be the same as for interior lots, except in the case of a reversed corner lot. In this case, there shall be a side yard on the street side of the corner lot of not less than fifty (50) per cent of the front yard required on the lots in the rear of such corner lot (excluding key lots), but such side yard need not exceed ten (10) feet. No accessory building on said reversed corner lot shall project beyond the front yard line required on the key lot in the rear, nor be located nearer than five (5) feet to the side lot line of such key lot.

Provided, however, that this regulation shall not be so interpreted as to reduce the buildable width (after providing the required interior side yard) of a reversed corner lot of record at the time this Article became effective, to less than twenty-eight (28) feet for a main building, nor less than twenty (20) feet for an accessory building.

3. Rear Yard—There shall be a rear yard of not less than twenty-five (25) per cent of the depth of the lot, but such rear yard need not exceed twenty-five (25) feet.

4. Lot Area—Every lot shall have a minimum average width of seventy-five (75) feet and a minimum area of twenty thousand (20,000) square feet

except as otherwise required for "A1" and "A2" uses. The minimum lot area per dwelling unit shall also be twenty thousand (20,000) square feet, except for a transitional dwelling use.

Provided that where a lot has less width or less area than herein required and was held under separate ownership or was of record at the time this Article became effective, such lot may be occupied by any use permitted in this Section, except for those uses requiring two (2) or five (5) acres.

Sec. 12.08—"R1" One-Family Zone

Exceptions to Area regulations are provided for in Sec. 12.22-C.

The following regulations shall apply in the "R1" One-Family Zone:

A. Use—No building, structure or land shall be used and no building or structure shall be hereafter erected, structurally altered, enlarged, or maintained, except for the following uses:

1. One-family dwellings.
2. Parks, playgrounds or community centers, owned and operated by a governmental agency.
3. Farming and truck gardening (except nurseries), including the keeping of poultry, rabbits, cows and goats, provided:

(a) That on a lot having an area of less than ten thousand (10,000) square feet there shall be no sale of products or commodities raised on the premises;

(b) That on a lot having an area of not less than ten thousand (10,000) square feet the products or commodities raised on the prem-

ises may be sold (except as provided in Subparagraphs (d) hereof), but no retail stand or other commercial structure shall be located thereon;

(c) That no poultry or rabbits shall be raised unless in conjunction with the residential use of the lot and no killing or dressing of poultry or rabbits for commercial purposes shall be permitted;

(d) That cows or goats shall not be kept on a lot having an area of less than ten thousand (10,000) square feet and in no case shall they be kept for commercial purposes.

4. Transitional uses shall be permitted in the "R1" Zone where the side of a lot abuts upon a lot in a commercial or industrial zone, provided such transitional use does not extend more than sixty-five (65) feet from the boundary of the less restricted zone which it adjoins, as follows:

(a) Two-family dwelling with the same area requirements as in the "R2" Zone.

(b) Home occupation or the principal office of a physician or dentist, provided such use is conducted within a dwelling and the residential character of such dwelling is not changed.

(c) Public parking area when located and developed as required in Sec. 12.21-A, 6.

5. The following uses may also be permitted if their location is first approved by the commission, as provided for a Sec. 12.24-A: schools, elementary and high; churches (except rescue mission or temporary revival) with yards as required in Sec.

12.21-C, 3; and golf courses (except driving tees or ranges, miniature courses and similar uses operated for commercial purposes).

6. Uses customarily incident to any of the above uses, including the office of a physician, dentist, minister of religion or other person authorized by law to practice medicine or healing, provided (a) that such office is situated in the same dwelling unit as the home of the occupant; (b) that such office shall not be used for the general practice of medicine, surgery, dentistry, or healing other than as a religious vocation, but may be used for consultation and emergency treatment as an adjunct to a principal office; and (c) that there shall be no assistants employed.

7. Accessory buildings including a private garage, accessory living quarters, guest house, recreation room, or a private stable, provided (a) that no guest house is located on a lot having an area of less than fifteen thousand (15,000) square feet; (b) that no accessory living quarters are located on any lot having an area of less than eight thousand (8000) square feet; and (c) that no stable is located on a lot having an area of less than ten thousand (10,000) square feet and its capacity does not exceed, one (1) horse for each five thousand (5000) square feet of lot area. Detached accessory buildings shall be located not less than seventy (70) feet from the front lot line, nor less than five (5) feet from any other street line except in the case of a stable which shall be located not less than twenty-five (25) feet from any other street line. Accessory living quarters,

guest house, recreation room and a private garage or any combination of such uses may be including in one building of one (1) or two (2) stories in height, provided that the portion of such building designed for accessory living quarters, guest house or recreation room is located not nearer than five (5) feet to any lot line.

8. Automobile parking space required, including private garages for dwellings and parking space for buildings other than dwellings, as provided for in Sec. 12.21-A, 4.

9. Name plates and signs as follows: one unlighted name plate for each dwelling unit, not exceeding one and one-half ($1\frac{1}{2}$) square feet in area, indicating the name of the occupant or the occupation in the case of those specified in Paragraph 6 of this Subsection; one identification sign not exceeding twelve (12) square feet in area for buildings other than dwellings; one church bulletin board, not exceeding eighteen (18) square feet in area; an unlighted sign or signs not exceeding a total area of twelve (12) square feet, appertaining to the prospective rental or sale of the property on which they are located; provided, that a name plate or identification sign shall be attached to and parallel with the front wall of the building, and further, that no name plate or advertising sign of any other character shall be permitted.

B. Height—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained to exceed two and one-

half ($2\frac{1}{2}$) stories or thirty-five (35) feet in height.

Exceptions to Height regulations are provided for in Sec. 12.22-B.

C. Area—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained unless the following yards and lot areas are provided and maintained in connection with such building, structure or enlargement:

1. Front Yard—There shall be a front yard of not less than twenty (20) per cent of the depth of the lot, but such front yard need not exceed twenty-five (25) feet. Provided, however, that where lots comprising forty (40) per cent or more of the frontage (excluding key and reversed corner lots) are developed with buildings having front yards with a variation of not more than ten, (10) feet in depth, the average of such front yards shall establish the front yard depth for the entire frontage. In determining such front yard depth, buildings located entirely on the rear one-half of a lot shall not be counted.

On key lots the minimum front yard shall be the average of the required front yard for the adjoining interior lot and the required side yard along the street side of the adjoining reversed corner lot. Where existing buildings on either or both of said adjoining lots are located nearer to the front or side lot lines than the yards required above, the yards established by such existing buildings shall be used in computing the front yard for a key lot.

In no case shall a front yard of more than fifty (50) feet be required.

2. Side Yards—On interior lots there shall be a side yard on each side of a main building of not less than ten (10) per cent of the width of the lot, but such side yard need not exceed five (5) feet and shall not be less than three (3) feet in width.

On corner lots the side yard regulation shall be the same as for interior lots, except in the case of a reversed corner lot. In this case, there shall be a side yard on the street side of the corner lot of not less than fifty (50) per cent of the front yard required on the lots in the rear of such corner lot (excluding key lots), but such side yard need not exceed ten (10) feet. No accessory building on said reversed corner lot shall project beyond the front yard line required on the key lot in the rear, nor be located nearer than five (5) feet to the side lot line of such key lot.

Provided, however, that this regulation shall not be so interpreted as to reduce the buildable width (after providing the required interior side yard) of a reversed corner lot of record at the time this Article became effective, to less than twenty-eight (28) feet for a main building, nor less than twenty (20) feet for an accessory building.

3. Rear Yard—There shall be a rear yard of not less than twenty-five (25) per cent of the depth of the lot, but such rear yard need not exceed twenty-five (25) feet.

4. Lot Area—Every lot shall have a minimum average width of fifty (50) feet and a minimum area of five thousand (5,000) square feet. The mini-

mun lot area per dwelling unit shall also be five thousand (5000) square feet, except for a transitional dwelling use.

Provided, that where a lot has a width of less than fifty (50) feet or an area of less than five thousand (5000) square feet and was held under separate ownership or was of record at the time this Article became effective, such lot may be occupied by any use permitted in this Section.

Exceptions to Area regulations are provided for in Sec. 12.22-C.

Sec. 12.09—"R2" Two-Family Zone

The following regulations shall apply in the "R2" Two-family Zone.

A. Use—No building, structure or land shall be used and no building or structure shall be hereafter erected, structurally altered, enlarged, or maintained, except for the following uses:

1. Any use permitted in the "R1" One-family Zone.

2. Two-family dwellings.

3. Transitional uses shall be permitted in the "R2" Zone where the side of a lot abuts upon a lot in a commercial or industrial zone, provided such transitional use does not extend more than sixty-five (65) feet from the boundary of the less restricted zone which it adjoins, as follows:

(a) Multiple dwelling with the same area requirements as in the "R3" Zone.

(b) Home occupation or the principal office of a physician or dentist, provided such use is conducted within a dwelling and the residen-

tial character of such dwelling is not changed.

(c) Public parking area when located and developed as required in Sec. 12.21-A, 6.

4. Uses customarily incident to any of the above uses—Same as “R1” Zone—Sec. 12.08-A, 6.

5. Accessory Buildings—Same as “R1” Zone—Sec. 12.08-A, 7.

6. Automobile parking space required, including private garages for dwellings and parking space for buildings other than dwellings, as provided for in Sec. 12.21-A, 4.

7. Name plates and signs—Same as “R1” Zone. Sec. 12.08-A, 9.

B. Height—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained to exceed two and one-half (2½) stories or thirty-five (35) feet in height.

Exceptions to Height regulations are provided for in Sec. 12.22-B.

C. Area—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained unless the following yards and lot areas are provided and maintained in connection with such building, structure or enlargement:

1. Front Yard—There shall be a front yard of not less than twenty (20) per cent of the depth of the lot, but such front yard need not exceed twenty (20) feet. Provided, however, that where lots comprising forty (40) per cent or more of the frontage (excluding key and reversed corner lots) are developed with buildings having front yards with a variation of not more than ten (10) feet in depth,

the average of such front yards shall establish the front yard depth for the entire frontage. In determining such front yard depth, buildings located entirely on the rear one-half of a lot shall not be counted.

On key lots the minimum front yard shall be the average of the required front yard for the adjoining interior lot and the required side yard along the street side of the adjoining reversed corner lot. Where existing buildings on either or both of said adjoining lots are located nearer to the front or side lot lines than the yards required above, the yards established by such existing buildings shall be used in computing the front yard for a key lot.

In no case shall a front yard of more than fifty (50) feet be required.

2. Side Yards—Same as required in “R1” Zone, Sec. 12.08-C, 2.

3. Rear Yard—Same as required in “R1” Zone, Sec. 12.08-C, 3.

4. Lot Area—Every lot shall have a minimum average width of fifty (50) feet and a minimum area of five thousand (5000) square feet. The minimum lot area per dwelling unit shall be twenty-five hundred (2500) square feet, except for a transitional dwelling use.

Provided, that where a lot has a width of less than fifty (50) feet or an area of less than five thousand (5000) square feet and was held under separate ownership or was of record at the time this Article became effective, such lot may be occupied by any use permitted in this Section. In no case,

however, shall a two-family dwelling have a lot area of less than two thousand (2000) square feet per dwelling unit.

Exceptions to Area regulations are provided for in Sec. 12.22-C.

Sec. 12.10—"R3" Multiple Dwelling Zone

The following regulations shall apply in the "R3" Multiple Dwelling Zone:

A. Use—No building, structure or land shall be used and no building or structure shall be hereafter erected, structurally altered, enlarged, or maintained, except for the following uses:

1. Any use permitted in the "R2" Two-family Zone.

2. Group dwellings.

3. Multiple dwellings.

4. Row dwellings.

5. Boarding or lodging houses.

6. Transitional uses shall be permitted in the "R3" Zone where the side of a lot abuts upon a lot in a commercial or industrial zone, provided such transitional use does not extend more than sixty-five (65) feet from the boundary of the less restricted zone which it adjoins, as follows:

(a) Home occupation or the principal office of a physician or dentist, provided such use is conducted within a dwelling and the residential character of such dwelling is not changed.

(b) Public parking area when located and developed as required in Sec. 12.21-A, 6.

7. Uses customarily incident to any of the above uses—Same as “R1” Zone—Sec. 12.08-A, 6.

8. Accessory buildings—Same as “R1” Zone—Sec. 12.08-A, 7.

9. Automobile parking space required, including private garages for dwellings and parking space for buildings other than dwellings, as provided for in Sec. 12.21-A, 4.

10. Name plates and signs—Same as “R1” Zone, Sec. 12.08-A, 9.

B. Height—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained to exceed two and one-half (2½) stories or thirty-five (35) feet in height.

Exceptions to Height regulations are provided for in Sec. 12.22-B.

C. Area—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained unless the following yards and lot areas are provided and maintained in connection with such building, structure or enlargement:

1. Front Yard—Same as required in “R2” Zone, Sec. 12.09-C, 1.

2. Side Yards—Same as required in “R1” Zone, Sec. 12.08-C, 2.

3. Rear Yard—Same as required in “R1” Zone, Sec. 12.08-C, 3.

4. Lot Area—Every lot shall have a minimum average width of fifty (50) feet and a minimum area of five thousand (5000) square feet. The minimum lot area per dwelling unit shall be sixteen hundred-fifty (1650) square feet.

Provided, that where a lot has a width of less than fifty (50) feet or an area of less than five thousand (5000) square feet and was held under separate ownership or was of record at the time this Article became effective, such lot may be occupied by any use permitted in this Section, except that where such lot has an area of less than five thousand (5000) square feet, but not less than four thousand (4000) square feet, the lot area per dwelling unit shall not be less than sixteen hundred-fifty (1650) square feet. In no case, however, shall more than one dwelling unit be permitted where such lot has an area of less than four thousand (4000) square feet.

Exceptions to Area regulations are provided for in Sec. 12.22-C.

Sec. 12.11—"R4" Multiple Dwelling Zone

The following regulations shall apply in the "R4" Multiple Dwelling Zone:

A. Use—No building, structure or land shall be used and no building or structure shall be hereafter erected, structurally altered, enlarged, or maintained, except for the following uses:

1. Any use permitted in the "R3" Multiple Dwelling Zone.
2. Apartment Hotels with a total of not more than twenty (20) guest rooms and dwelling units.
3. Court Apartments.
4. Hotels with a total of not more than twenty (20) guest rooms.
5. Fraternity or sorority houses.
6. Churches (except rescue mission or temporary revival), or institutions of an educational or philan-

thropic nature (other than those of a correctional nature), with yards as required in Sec. 12.21-C, 3.

7. Museums or libraries (non-profit) with yards as required in Sec. 12.21-C, 3.

8. Transitional uses shall be permitted in the "R4" Zone where the side of a lot abuts upon a lot in a commercial or industrial zone, provided such transitional use does not extend more than sixty-five (65) feet from the boundary of the less restricted zone which it adjoins, as follows:

(a) Home occupation or the principal office of a physician or dentist, provided such use is conducted within a dwelling and the residential character of such dwelling is not changed.

(b) Public parking area when located and developed as required in Sec. 12.21-A, 6.

9. Uses customarily incident to any of the above uses, including the office of a physician, dentist, minister of religion or other person authorized by law to practice medicine or healing, provided (a) that such office is situated in the same dwelling unit as the home of the occupant; (b) that such office shall not be used for the general practice of medicine, surgery, dentistry, or healing other than as a religious vocation, but may be used for consultation and emergency treatment as an adjunct to a principal office; and (c) that there shall be no assistants employed.

10. Accessory buildings, including a private garage, accessory living quarters, guest house, recreation room, or a private stable, provided (a) that no guest house is located on a lot having an area

of less than fifteen thousand (15,000) square feet; (b) that no accessory living quarters are located on any lot having an area of less than eight thousand (8000) square feet; and (c) that no stable is located on a lot having an area of less than ten thousand (10,000) square feet and its capacity does not exceed one (1) horse for each five thousand (5000) square feet of lot area. Detached accessory buildings shall be located not less than seventy (70) feet from the front lot line, nor less than five (5) feet from any other street line except in the case of a stable which shall be located not less than twenty-five (25) feet from any other street line. Accessory living quarters, guest house, recreation room and a private garage or any combination of such uses may be included in one building of one (1) or two (2) stories in height, provided that the portion of such building designed for accessory living quarters, guest house or recreation room is located not nearer than five (5) feet to any lot line.

11. Name plates and signs as follows: one unlighted name plate for each dwelling unit, not exceeding one and one-half ($1\frac{1}{2}$) square feet in area, indicating the name of the occupant, or the occupation in the case of those specified in Paragraph 9 of this Subsection; one lighted identification sign (excluding illuminated signs of the flashing or animated type) not exceeding twelve (12) square feet in area for multiple dwellings having four (4) or more dwelling units and for buildings other than dwellings; one church bulletin board not exceeding eighteen (18) square feet in area; an unlighted

sign or signs not exceeding a total area of twelve (12) square feet appertaining to the prospective rental or sale of the property on which they are located; provided, that a name plate or identification sign shall be attached to and parallel with the front wall of the building, and further, that no name plate or advertising sign of any other character shall be permitted.

12. Automobile parking space required, including private garages for dwellings and parking space for buildings other than dwellings as provided for in Sec. 12.21-A, 4.

13. Loading space as required in Sec. 12.21-A, 5.

B. Height—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained to exceed three (3) stories or forty-five (45) feet in height.

Exceptions to Height regulations are provided for in Sec 12.22-B.

C. Area—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained unless the following yards and lot areas are provided and maintained in connection with such building, structure or enlargement:

1. Front Yard—There shall be a front yard of not less than twenty (20) per cent of the depth of the lot, but such front yard need not exceed twenty (20) feet. Provided, however, that where lots comprising forty (40) per cent or more of the frontage (excluding key and reversed corner lots) are developed with buildings having front yards with

a variation of not more than ten (10) feet in depth, the average of such front yards shall establish the front yard depth for the entire frontage. In determining such front yard depth, buildings located entirely on the rear one-half of a lot shall not be counted.

On key lots the minimum front yard shall be the average of the required front yard for the adjoining interior lot and the required side yard along the street side of the adjoining reversed corner lot. Where existing buildings on either or both of said adjoining lots are located nearer to the front or side lot lines than the yards required above, the yards established by such existing buildings shall be used in computing the front yard for a key lot.

In no case shall a front yard of more than fifty (50) feet be required.

2. Side Yards—On interior lots there shall be a side yard on each side of a main building of not less than ten (10) per cent of the width of the lot, but such side yard need not exceed five (5) feet and shall not be less than three (3) feet in width for a building not more than two and one-half (2½) stories in height. For three (3) story buildings, one (1) foot shall be added to the width of each side yard required above.

On corner lots the side yard regulations shall be the same as for interior lots, except in the case of a reversed corner lot. In this case, there shall be a side yard on the street side of the corner lot of not less than fifty (50) per cent of the front yard required on the lots in the rear of such corner lot

(excluding key lots), but such side yard need not exceed ten (10) feet. No accessory building on said reversed corner lot shall project beyond the front yard line required on the key lot in the rear, nor be located nearer than five (5) feet to the side lot line of such key lot.

Provided, however, that this regulation shall not be so interpreted as to reduce the buildable width (after providing the required interior side yard) of a reversed corner lot of record at the time this Article became effective to less than twenty-eight (28) feet for a main building, nor less than twenty (20) feet for an accessory building.

3. Rear Yard—There shall be a rear yard of not less than twenty-five (25) per cent of the depth of the lot, but such rear yard need not exceed twenty-five (25) feet for interior lots nor fifteen (15) feet for corner lots.

4. Lot Area—Every lot shall have a minimum average width of fifty (50) feet and a minimum area of five thousand (5000) square feet. The minimum lot area per dwelling unit shall be eight hundred (800) square feet.

Provided that where a lot has a width of less than fifty (50) feet or an area of less than five thousand (5000) square feet and was held under separate ownership or was of record at the time this Article became effective, such lot may be occupied by any use permitted in this Section, except that where such lot has an area of less than five thousand (5000) square feet, but not less than four thousand (4000)

square feet, the lot area per dwelling unit shall not be less than one thousand (1000) square feet. In no case, however, shall more than one dwelling unit be permitted where such lot has an area of less than four thousand (4000) square feet. Further, the above regulations shall apply to a suite of two (2) or more guest rooms in a hotel or apartment hotel, but not to individual guest rooms in such buildings.

Exceptions to Area regulations are provided for in Sec. 12.22-C.

Sec. 12.12—"R5" Multiple Dwelling Zone

The following regulations shall apply in the "R5" Multiple Dwelling Zone:

A. Use—No building, structure or land shall be used and no building or structure shall be hereafter erected, structurally altered, enlarged, or maintained, except for the following uses:

1. Any use permitted in the "R4" Multiple Dwelling Zone.

2. Apartment hotels.

3. Hotels, in which incidental business may be conducted only as a service for the persons living therein, provided there is no entrance to such place of business except from the inside of the building and that no sign advertising such business shall be visible from outside the building.

4. Clubs or lodges, (private, nonprofit), chartered as such by the State.

5. Hospitals or sanitariums (except animal hospitals, clinics, and hospitals or sanitariums for contagious, mental, or drug or liquor-addict cases), with yards as required in Sec. 12.21-C, 3.

6. Transitional uses shall be permitted in the "R5" Zone where the side of a lot abuts upon a lot in a commercial or industrial zone, provided such transitional use does not extend more than sixty-five (65) feet from the boundary of the less restricted zone which it adjoins, as follows:

(a) Home occupation or the principal office of a physician or dentist, provided such use is conducted within a dwelling and the residential character of such dwelling is not changed.

(b) Public parking area when located and developed as required in Sec. 12.21-A, 6.

7. Uses customarily incident to any of the above uses—Same as "R4" Zone—Sec. 12.11-A, 9.

8. Accessory buildings—Same as "R4" Zone, Sec. 12.11-A, 10.

9. Name plates and signs—Same as "R4" Zone, Sec. 12.11-A, 11.

10. Automobile parking space required, including private garages for dwellings and parking space for buildings other than dwellings, as provided for in Sec. 12.21-A, 4.

11. Loading space as required in Sec. 12.21-A, 5.

B. Height—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained to exceed thirteen (13) stories or one hundred-fifty (150) feet in height.

Exceptions to Height regulations are provided for in Sec. 12.22-B.

C. Area—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained unless the following yards and lot areas are provided and maintained in connection with such building, structure or enlargement:

1. Front Yard—Same as required in “R4” Zone, Sec. 12.11-C, 1.

2. Side Yards—Same as required in “R4” Zone, Sec. 12.11-C, 2, except that for buildings more than three (3) stories in height, each side yard shall be increased one (1) foot in width for each additional story from the fourth to the sixth story inclusive, and one and one-half ($1\frac{1}{2}$) feet in width for each additional story from the seventh to the thirteenth story inclusive.

3. Rear Yard—Same as required in “R4” Zone, Sec. 12.11-C, 3.

4. Lot Area—Every lot shall have a minimum average width of fifty (50) feet and a minimum area of five thousand (5000) square feet. The minimum lot area per dwelling unit shall be four hundred (400) square feet.

Provided, that where a lot has a width of less than fifty (50) feet or an area of less than five thousand (5000) square feet and was held under separate ownership or was of record at the time this Article became effective, such lot may be occupied by any use permitted in this Section, except that where such

lot has an area of less than five thousand (5000) square feet, but not less than four thousand (4000) square feet, the lot area per dwelling unit shall not be less than six hundred (600) square feet. In no case, however, shall more than one dwelling unit be permitted where such lot has an area of less than four thousand (4000) square feet. Further, the above regulations shall apply to a suite of two (2) or more guest rooms in a hotel or apartment hotel, but not to individual guest rooms in such buildings.

Exceptions to Area regulations are provided for in Sec. 12.22-C.

Sec. 12.13—"C1" Limited Commercial Zone

The following regulations shall apply in the "C1" Limited Commercial Zone:

A. Use—No building, structure or land shall be used and no building or structure shall be hereafter erected, structurally altered, enlarged, or maintained, except for the following uses:

1. Any use permitted in the "R3" Multiple Dwelling Zone.
2. Bakery.
3. Bank.
4. Barber shop or beauty parlor.
5. Book or stationery store.
6. Clothes cleaning agency or pressing establishment.
7. Clubs or lodges (non-profit), fraternal or religious associations.
8. Confectionery store.

9. Custom dressmaking or millinery shop.
10. Drug store.
11. Dry goods or notions store.
12. Florist or gift shop.
13. Grocery, fruit, or vegetable store.
14. Hospitals, sanitariums or clinics (except animal hospitals, and hospitals or sanitariums for contagious, mental, or drug or liquor-addict cases).
15. Hardware or electric appliance store.
16. Jewelry store.
17. Laundry agency.
18. Meat market or delicatessen store.
19. Offices, business or professional.
20. Photographer.
21. Restaurant, tea-room or cafe (excluding dancing or entertainment).
22. Shoe store or shoe repair shop.
23. Tailor, clothing or wearing apparel shop.
24. Other uses similar to the above, as provided for in Sec. 12.21-A, 2.

The above specified stores, shops or businesses shall be retail establishments selling new merchandise exclusively and shall be permitted only under the following conditions:

(a) Such stores, shops or businesses shall be conducted wholly within an enclosed building.

(b) All products produced, whether primary or incidental, shall be sold at retail on the premises and not more than two (2) persons shall be engaged in such production or in the servicing of materials.

(c) Any exterior sign displayed shall pertain only to a use conducted within the building; shall be attached flat against a wall of the building and parallel with its horizontal dimension and shall front the principal street, a parking area in the rear or, in the case of a corner building, on that portion of the side street wall within fifty (50) feet of the principal street. In no case shall a sign project above the roof line.

(d) All exterior walls of a building hereafter erected, extended or structurally altered, which face property located in an "A," "RA" or "R" Zone, shall be designed, treated and finished in a uniform and satisfactory manner approved by the Department of Building and Safety.

25. Uses customarily incident to any of the above uses and accessory buildings, when located on the same lot, including a storage garage for the exclusive use of the patrons of the above stores or businesses.

26. Automobile parking space required for dwellings and for buildings other than dwellings, as provided for in Sec. 12.21-A, 4.

27. Public parking area for the exclusive use of the patrons of the stores, shops or businesses in the immediate commercial zone when located and developed as required in Sec. 12.21-A, 6.

28. Loading space as required in Sec. 12.21-A, 5.

B. Height—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained to exceed two and one-half ($2\frac{1}{2}$) stories or thirty-five (35) feet in height.

Exceptions to Height regulations are provided for in Sec. 12.22-B.

C. Area—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained unless the following yards and lot areas are provided and maintained in connection with such building, structure or enlargement.

1. Front Yard—Where all the frontage is located in the "C1" Zone, no front yard shall be required. Where the frontage is located partly in the "C1" Zone and an "A," "RA" or "R" Zone, the front yard requirement of the "A," "RA" or "R" Zone shall apply in the "C1" Zone.

2. Side Yards—Where the side of a lot in the "C1" Zone abuts upon the side of a lot in an "A," "RA" or "R" Zone, there shall be a side yard of not less than ten (10) per cent of the width of the lot, but such side yard need not exceed five (5) feet and shall not be less than three (3) feet in width.

Where a reversed corner lot rears upon the side of a lot in an "A," "RA" or "R" Zone, the side yard on the street side of the reversed corner lot shall be not less than fifty (50) per cent of the front yard required on the lots in the rear of such corner lot, (excluding key lots) but such side yard need not exceed ten (10) feet. No accessory building on said

reversed corner lot shall project beyond the front yard line required on the key lot in the rear, nor shall be located nearer than five (5) feet to the side lot line of such key lot.

Provided, however, that this regulation shall not be so interpreted as to reduce the buildable width of a reversed corner lot of record at the time this Article became effective to less than twenty-eight (28) feet for a main building, nor less than twenty (20) feet for an accessory building. In all other cases, a side yard for a commercial building shall not be required, but if provided, it shall not be less than three (3) feet in width.

Buildings hereafter erected and used exclusively for dwelling purposes shall comply with the side yard regulations of the "R1" Zone—Sec. 12.08-C, 2.

3. Rear Yard—There shall be a rear yard of not less than twenty-five (25) per cent of the depth of the lot, but such rear yard need not exceed twenty-five (25) feet.

4. Lot Area—Buildings hereafter erected and used wholly or partly for dwelling purposes shall comply with the lot area requirements of the "R3" Zone—Sec. 12.10-C, 4.

Exceptions to Area regulations are provided for in Sec. 12.22-C.

Sec. 12.14—"C2" Commercial Zone

The following regulations shall apply in the "C2" Commercial Zone:

A. Use—No building, structure or land shall be used and no building or structure shall be hereafter

erected, structurally altered, enlarged, or maintained, except for the following uses:

1. Any use permitted in the "C1" and "R5" Zones.

2. Retail stores or businesses.

3. Advertising signs or structures and billboards.

4. Amusement enterprises, including a billiard or pool hall, bowling alley, boxing area, dance hall, games of skill and science, penny arcade, shooting gallery, theatre and the like, if conducted wholly within a completely enclosed building.

5. Art or antique shop, if conducted wholly within a completely enclosed building.

6. Auditorium.

7. Automobile service station, provided any tube and tire repairing, battery charging, and storage of merchandise and supplies are conducted wholly within a building. Provided, further, that any lubrication or washing, not conducted wholly within a building, shall be permitted only if a masonry wall six (6) feet in height is erected and maintained between such uses and any adjoining "RA" or "R" Zone.

8. Automobile and trailer sales area, provided (a) that such area is located and developed as required in Sec. 12.21-A, 6, and (b) that any incidental repair of automobiles or trailers shall be conducted and confined wholly within a building.

9. Baseball or football stadium.

10. Baths, turkins and the like.

11. Bird store, pet shop or taxidermist.

12. Business college or private school operated as a commercial enterprise.

13. Blueprinting or photostating.

14. Carpenter shop, if conducted wholly within a completely enclosed building, but excluding cabinet shops or furniture manufacture.

15. Catering establishment.

16. Circus or amusement enterprise of a similar type, transient in character.

17. Cleaning establishment using not more than two (2) clothes cleaning units, neither of which shall have a rated capacity of more than forty (40) pounds, using cleaning fluid which is non-explosive and non-inflammable at temperatures below one hundred thirty-eight and five-tenths degrees Fahrenheit (138.5° F.).

18. Department, furniture or radio store.

19. Drive-in business where persons are served in automobiles, such as refreshment stands, restaurants, food stores, and the like.

20. Feed or fuel store.

21. Film exchange.

22. Hospitals or sanitariums (except animal hospitals.)

23. Ice storage house, not more than five (5) tons capacity.

24. Interior decorating store.

25. Laundry.

26. Medical or dental clinics and laboratories.

27. Music, conservatory or music instruction.

28. Newsstand.

29. Nursery, flower or plant, provided that all incidental equipment and supplies, including fertilizer and empty cans, are kept within a building.

30. Pawnshop.

31. Plumbing or sheet metal shops, if conducted wholly within a completely enclosed building.

32. Pony riding ring, without stables.

33. Printing, lithographing or publishing.

34. Public garage, including automobile repairing, and incidental body and fender work, painting or upholstering, if all operations are conducted wholly within a completely enclosed building. Provided, however, that where a public garage is located on a lot which does not abut an alley and is within fifty (50) feet of a lot in an "RA" or "R" Zone, the garage wall, which parallels the nearest line of such zone, shall have no openings other than stationary windows.

35. Public parking area, when located and developed as required in Sec. 12.21-A, 6.

36. Public services, including electric distributing substation, fire or police station, telephone exchange, and the like.

37. Second hand store, if conducted wholly within a completely enclosed building.

38. Sign painting shop, if conducted wholly within a completely enclosed building.

39. Storage building for household goods.

40. Studios (except motion picture).

41. Tire shop operated wholly within a building.

42. Tourist court.

43. Trade school, if not objectionable due to noise, odor, vibration, or other similar causes.

44. Upholstering shop, if conducted wholly within a completely enclosed building.

45. Wedding chapel, rescue mission or temporary revival church.

46. Wholesale merchandise broker, excluding wholesale storage.

47. Other uses similar to the above, as provided for in Sec. 12.21-A, 2.

48. The following uses may also be permitted if their location is first approved by the Administrator, as provided for in Sec. 12.25-A; mortuary or funeral parlor; trailer camp or public camp.

49. Uses customarily incident to any of the above uses and accessory buildings when located on the same lot.

Provided that (a) there shall be no manufacture, compounding, processing or treatment of products other than that which is clearly incidental and essential to a retail store or business and where all such products are sold at retail on the premises; (b) there shall not be more than five (5) persons engaged in the manufacture, compounding, processing or treatment of products; or in catering, cleaning, laundering, plumbing, upholstering, and the like; (c) such uses, operations or products are not objectionable due to odor, dust, smoke, noise, vibration or other similar causes; and (d) all exterior walls of a building hereafter erected, extended or structurally altered, which face property located in an "A," "RA" or "R" Zone, shall be designed,

treated and finished in a uniform and satisfactory manner approved by the Department of Building and Safety.

50. Automobile parking space required for dwellings and for buildings other than dwellings, as provided for in Sec. 12.21-A, 4.

51. Loading space as required in Sec. 12.21-A, 5.

B. Height—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained to exceed three (3) stories or forty-five (45) feet in height.

Exceptions to Height regulations are provided for in Sec. 12.22-B.

C. Area—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained unless the following yards and lot areas are provided and maintained in connection with such building, structure or enlargement.

1. Front Yard—Not required.

2. Side Yards—Where the side of a lot in the "C2" Zone abuts upon the side of a lot in an "A," "RA" or "R" Zone, there shall be a side yard of not less than ten (10) per cent of the width of the lot, but such side yard need not exceed five (5) feet and shall not be less than three (3) feet in width. In all other cases, a side yard for a commercial building shall not be required, but if provided, it shall not be less than three (3) feet in width.

Buildings hereafter erected and used exclusively for residential purposes shall comply with the side yard regulations of the "R4" Zone—Sec. 12.11-C, 2.

3. Rear Yard—There shall be a rear yard of not less than twenty (20) per cent of the depth of the lot, but such rear yard need not exceed twenty (20) feet for interior lots nor ten (10) feet for corner lots. Provided, that where the rear of a lot in the “C2” Zone abuts upon the side or rear of a lot in a “C,” “CM” or “M” Zone, the rear yard need not exceed ten (10) feet in depth.

Buildings hereafter erected and used exclusively for residential purposes shall comply with the rear yard regulations of the “R4” Zone—Sec. 12.11-C, 3.

4. Lot Area—Buildings hereafter erected and used wholly or partly for dwelling purposes shall comply with the lot area requirements of the “R4” Zone—Sec. 12.11-C, 4.

Exceptions to Area regulations are provided for in Sec. 12.22-C.

Sec. 12.15—“C3” Commercial Zone

The following regulations shall apply in the “C3” Commercial Zone:

A. Use—No building, structure or land shall be used and no building or structure shall be hereafter erected, structurally altered, enlarged, or maintained, except for the following uses:

1. Any use permitted in the “C2” Zone.
2. Automobile parking space required for dwellings and for buildings other than dwellings, as provided for in Sec. 12.21-A, 4.
3. Loading space as required in Sec. 12.21-A, 5.

B. Height—No building or structure nor the enlargement of any building or structure shall be here-

after erected or maintained to exceed thirteen (13) stories or one hundred-fifty (150) feet in height; provided, however, that where any such building, structure or enlargement exceeds a height of six (6) stories or seventy-five (75) feet, that portion thereof above said height shall be set back from the required yard lines, or lot lines where no yards are required, at least one (1) foot for each four (4) feet of height above six (6) stories or seventy-five (75) feet.

Exceptions to Height regulations are provided for in Sec. 12.22-B.

C. Area—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained unless the following yards and lot areas are provided and maintained in connection with such building, structure or enlargement:

1. Front Yard—Not required.
2. Side Yards—Where the side of a lot in the “C3” Zone abuts upon the side of a lot in an “A,” “RA” or “R” Zone, there shall be a side yard of not less than ten (10) per cent of the width of the lot, but such side yard need not exceed five (5) feet and shall not be less than three (3) feet in width. In all other cases, a side yard for a commercial building shall not be required, but if provided, it shall not be less than three (3) feet in width.

Buildings hereafter erected and used exclusively for residential purposes shall comply with the side yard regulations of the “R5” Zone—Sec. 12.12-C, 2.

3. Rear Yard—There shall be a rear yard of not less than twenty (20) per cent of the depth of the lot, but such rear yard need not exceed twenty (20) feet for interior lots nor ten (10) feet for corner lots. Provided, that where the rear of a lot in the “C3” Zone abuts upon the side or rear of a lot in a “C,” “CM” or “M” Zone, the rear yard need not exceed ten (10) feet in depth.

Buildings hereafter erected and used exclusively for residential purposes shall comply with the rear yard regulations of the “R4”—Sec. 12.11-C, 3. [50]

4. Lot Area—Buildings hereafter erected and used wholly or partly for dwelling purposes shall comply with the lot area requirements of the “R5” Zone—Sec. 12.12-C, 4.

Exceptions to Area regulations are provided for in Sec. 12.22-C.

Sec. 12.16—“C4” Commercial Zone

The following regulations shall apply in the “C4” Commercial Zone:

A. Use—No building, structure or land shall be used and no building or structure shall be hereafter erected, structurally altered, enlarged, or maintained, except for the following uses:

1. Any use permitted in the “C1” Zone.
2. Any use permitted in the “C2” Zone except:
 - (a) Amusement enterprises, including (1) boxing arena; (2) games of skill and science; (3) merry-go-round, ferris wheel or carousel; (4) penny arcade; and (5) shooting gallery.

(b) Automobile and trailer sales area, except an area for the incidental sale of used automobiles by an authorized agency dealing in new automobiles.

(c) Baseball or football stadium.

(d) Carpenter shop.

(e) Circus or amusement enterprises of a similar type, transient in character.

(f) Feed and fuel store.

(g) Hospital or sanitarium.

(h) Ice storage house.

(i) Laundry.

(j) Pawnshop.

(k) Pet shop.

(l) Plumbing or sheet metal shop.

(m) Pony riding ring.

(n) Public services, including electric distributing substation.

(o) Second hand store.

(p) Storage building for household goods.

Provided that all "C2" uses shall be subject to the same limitations and controls as specifically set forth in the "C2" Zone—Sec. 12.14-A.

3. Automobile parking space required for dwellings and buildings other than dwellings, as provided for in Sec. 12.21-A, 4.

4. Loading space as required in Sec. 12.21-A, 5.

B. Height—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained to exceed thirteen (13) stories or one hundred-fifty (150) feet in height.

Exceptions to Height regulations are provided for in Sec. 12.22-B.

C. Area—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained unless the following yards and lot areas are provided and maintained in connection with such building, structure or enlargement:

1. Front Yard—Not required.

2. Side Yards—Where the side of a lot in the “C4” Zone abuts upon the side of a lot in an “R” Zone, there shall be a side yard of not less than ten (10) per cent of the width of the lot, but such side yard need not exceed five (5) feet and shall not be less than three (3) feet in width. In all other cases, a side yard for a commercial building shall not be required, but if provided, it shall not be less than three (3) feet in width.

Buildings hereafter erected and used exclusively for residential purposes shall comply with the side yard regulations of the “R5” Zone—Sec. 12.12-C, 2.

3. Rear Yard—There shall be a rear yard of not less than twenty (20) per cent of the depth of the lot, but such rear yard need not exceed twenty (20) feet for interior lots nor ten (10) feet for corner lots. Provided, that where the rear of a lot in the “C4” Zone abuts upon the side or rear of a lot in a “C,” “CM” or “M” Zone, the rear yard need not exceed ten (10) feet in depth.

Buildings hereafter erected and used exclusively for residential purposes shall comply with the rear yard regulations of the “R4” Zone—Sec. 12.11-C, 3.

4. Lot Area—Buildings hereafter erected and used wholly or partly for dwelling purposes shall comply with the lot area requirements of the “R5” Zone—Sec. 12.12-C, 4.

Exceptions to Area regulations are provided for in Sec. 12.22-C.

Sec. 12.17—“CM” Business Zone

The following regulations shall apply in the “CM” Business Zone:

A. Use—No building, structure or land shall be used and no building or structure shall be hereafter erected, structurally altered, enlarged, or maintained, except for the following uses:

1. Any use permitted in the “C2” Zone.

2. Any other store or business which does not involve the manufacture, assembling, compounding, packaging, processing or treatment of products other than that which is clearly incidental and essential to a retail store or business and where all such products are sold at retail on the premises.

3. Any use permitted in the “M1” Zone, provided that not more than ten (10) per cent of the rentable floor area of any floor of a building is devoted to such use. In determining the floor area so used it shall be all the rentable floor area occupied by concerns engaged in such production activities exclusive of that used for offices, display, waiting rooms or clerical work.

4. Uses customarily incident to any of the above uses and accessory buildings when located on the same lot.

5. Automobile parking space required for dwellings and for buildings other than dwellings, as provided for in Sec. 12.21-A, 4.

6. Loading space as required in Sec. 12.21-A, 5.

B. Height—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained to exceed thirteen (13) stories or one hundred-fifty (150) feet in height.

Exceptions to Height regulations are provided for in Sec. 12.22-B.

C. Area—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained unless the following yards and lot areas are provided and maintained in connection with such building, structure or enlargement.

1. Yards—Not required for business buildings, but if a yard is provided it shall not be less than three (3) feet in width or depth.

Buildings hereafter erected and used exclusively for residential purposes shall comply with the side and rear yard regulations of the "R5" Zone—Sec. 12.12-C, 2 and 3.

2. Lot Area—Buildings hereafter erected and used wholly or partly for dwelling purposes shall comply with the lot area requirements of the "R5" Zone—Sec. 12.12-C, 4.

Exceptions to Area regulations are provided for in Sec. 12.12-C.

Sec. 12.18—"M1" Limited Industrial Zone

The following regulations shall apply in the "M1" Limited Industrial Zone:

A. Use—No building, structure or land shall be used and no building or structure shall be hereafter erected, structurally altered, enlarged, or maintained, except for uses permitted in the "C2" Zone or any of the following uses:

1. Uses to be conducted wholly within a completely enclosed building except for the on-site parking of delivery vehicles which are incidental thereto:

(a) The manufacture, compounding, processing, packaging or treatment of such products as bakery goods, candy, cosmetics, dairy products, drugs, perfumes, pharmaceuticals, perfumed toilet soap, toiletries, and food products except fish and meat products, sauerkraut, vinegar, yeast and the rendering or refining of fats and oils.

(b) The manufacture, compounding, assembling or treatment of articles or merchandise from the following previously prepared materials: bone, cellophane, canvas, cloth, cork, feathers, felt, fibre, fur, glass, hair, horn, leather, paper, plastics, precious or semi-precious metals or stones, shell, textiles, tobacco, wood (excluding planing mill), yarns, and paint not employing a boiling process.

(c) The manufacture of pottery and figurines or other similar ceramic products, using

only previously pulverized clay, and kilns fired only by electricity or gas.

(d) The manufacture and maintenance of electric and neon signs, billboards, commercial advertising structures, light sheet metal products, including heating and ventilating ducts and equipment, cornices, eaves, and the like.

(e) Manufacture of musical instruments, toys, novelties, and rubber and metal stamps.

(f) Automobile assembling, painting, upholstering, rebuilding, reconditioning, body and fender works, truck repairing or overhauling, tire retreading or recapping, battery manufacturing, and the like.

(g) Blacksmith shop and machine shop excluding punch presses over twenty (20) tons rated capacity, drop hammers, and automatic screw machines.

(h) Foundry casting lightweight non-ferrous metal not causing noxious fumes or odors.

(i) Laundry, cleaning and dyeing works, and carpet and rug cleaning.

(j) Distribution plants, parcel delivery, ice and cold storage plant, bottling plant, and food commissary or catering establishments.

(k) Wholesale business, storage buildings, and warehouses.

(l) Assembly of electrical appliances, electronic instruments and devices, radios and phonographs, including the manufacture of small parts only, such as coils, condensers, transformers, crystal holders, and the like.

(m) Laboratories; experimental, photo or motion picture, film, or testing.

(n) Veterinary or dog or cat hospitals, and kennels.

(o) Poultry or rabbit killing incidental to a retail business on the same premises.

2. Uses to be conducted wholly within a completely enclosed building or within an area enclosed on all sides with a solid wall, compact evergreen hedge or uniformly painted board fence, not less than six (6) feet in height:

(a) Motion picture studio.

(b) Building material sales yard, including the sale of rock, sand, gravel and the like as an incidental part of the main business, but excluding concrete mixing.

(c) Contractor's equipment storage yard or plant, or rental of equipment commonly used by contractors.

(d) Retail lumber yard, including only incidental mill work.

(e) Feed and fuel yard.

(f) Draying, freighting or trucking yard or terminal.

(g) Public utility service yard or electrical receiving or transforming station.

(h) Small boat building, except ship-building.

3. Other uses similar to the above, as provided for in Sec. 12.21-A, 2.

4. Uses customarily incident to any of the above uses and accessory buildings when located on the same lot.

5. Automobile parking space required for dwellings and for buildings other than dwellings, as provided for in Sec. 12.21-A, 4.

6. Loading space as required in Sec. 12.21-A, 5.

B. Height—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained to exceed three (3) stories or forty-five (45) feet in height.

Exceptions to Height regulations are provided for in Sec. 12.22-B.

C. Area—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained unless the following yards and lot areas are provided and maintained in connection with such building, structure or enlargement.

1. Front Yard—Not required.

2. Side Yards—Where the side of a lot in the "M1" Zone abuts upon the side of a lot in an "A," "RA" or "R" Zone, there shall be a side yard of not less than ten (10) per cent of the width of the lot, but such side yard need not exceed five (5) feet and shall not be less than three (3) feet in width. In all other cases, a side yard for a commercial or industrial building shall not be required, but if provided, it shall not be less than three (3) feet in width.

Buildings hereafter erected and used exclusively for residential purposes shall comply with the side yard regulations of the "R4" Zone—Sec. 12.11-C, 2.

3. Rear Yard—No rear yard shall be required except where the "M1" Zone abuts upon an "A," "RA" or "R" Zone, in which case there shall be a rear yard of not less than twenty (20) per cent

of the depth of the lot, but such rear yard need not exceed twenty (20) feet for interior lots nor ten (10) feet for corner lots.

Buildings hereafter erected and used exclusively for residential purposes shall comply with the rear yard regulations of the "R4" Zone—Sec. 12.11-C, 3.

4. Lot Area—Buildings hereafter erected and used wholly or partly for dwelling purposes shall comply with the lot area requirements of the "R4" Zone—Sec. 12.11-C, 4.

Exceptions to Area regulations are provided for in Sec. 12.22-C.

Sec. 12.19—"M2" Light Industrial Zone

The following regulations shall apply in the "M2" Light Industrial Zone:

A. Use—No building, structure or land shall be used and no building or structure shall be hereafter erected, structurally altered, enlarged, or maintained, except for the following uses:

1. Any use permitted in the "M1" Zone within or without a building or an enclosed area.

2. Any other use except those first permitted in the "M3" Zone; or those uses which are or may become obnoxious or offensive by reason of the emission of odor, dust, smoke, noise, gas, fumes, cinders, vibration, refuse matter or water carried waste as determined by the Administrator.

3. Uses customarily incident to any of the above uses and accessory buildings when located on the same lot.

4. Automobile parking space required for dwellings and for buildings other than dwellings as provided for in Sec. 12.21-A, 4.

5. Loading space as required in Sec. 12.21-A, 5.

B. Height—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained to exceed thirteen (13) stories or one hundred-fifty (150) feet in height; provided, however, that where any such building, structure or enlargement exceeds a height of eight (8) stories or one hundred (100) feet, that portion thereof above said height shall be set back from the required yard lines, or lot lines where no yards are required, at least one (1) foot for each four (4) feet of height above eight (8) stories or one hundred (100) feet.

Exceptions to Height regulations are provided for in Sec. 12.22-B.

C. Area—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained unless the following yards and lot areas are provided and maintained in connection with such building, structure or enlargement;

1. Front Yard—Not required.

2. Side Yards—Where the side of a lot in the "M2" Zone abuts upon the side of a lot in an "A," "RA" or "R" Zone, there shall be a side yard of not less than ten (10) per cent of the width of the lot, but such side yard need not exceed five (5) feet and shall not be less than three (3) feet in width. In all other cases, a side yard for a commercial or industrial building shall not be required, but if provided it shall not be less than three (3) feet in width.

Buildings hereafter erected and used exclusively for residential purposes shall comply with the side

yard regulations of the "R5" Zone, Sec. 12.12-C, 2.

3. Rear Yard—No rear yard shall be required except where the "M2" Zone abuts upon an "A," "RA" or "R" Zone, in which case there shall be a rear yard of not less than twenty (20) per cent of the depth of the lot, but such rear yard need not exceed twenty (20) feet for interior lots nor ten (10) feet for corner lots.

Buildings hereafter erected and used exclusively for residential purposes shall comply with the rear yard regulations of the "R4" Zone—Sec. 12.11-C, 3.

4. Lot Area—Buildings hereafter erected and used wholly or partly for dwelling purposes shall comply with the lot area requirements of the "R5" Zone—Sec. 12.12-C, 4.

Exceptions to Area regulations are provided for in Sec. 12.22-C.

Sec. 12.20—"M3" Heavy Industrial Zone

The following regulations shall apply in the "M3" Heavy Industrial Zone:

A. Use—No building, structure or land shall be used and no building or structure shall be hereafter erected, structurally altered, enlarged, or maintained, except for the following uses:

1. Any use permitted in the "M2" Zone provided, however, that no building, structure or portion thereof shall be hereafter erected, structurally altered, converted, used or maintained for any use permitted in any "R" Zone, except accessory buildings which are incidental to the use of the land.

2. Acetylene gas manufacture or storage.
3. Alcohol manufacture.
4. Ammonia, bleaching powder or chlorine manufacture.
5. Asphalt manufacture or refining.
6. Automobile wrecking, if conducted wholly within a building.
7. Blast furnace or coke oven.
8. Boiler workers.
9. Brick, tile or terra cotta manufacture.
10. Chemical manufacture.
11. Concrete or cement products manufacture.
12. Cotton gin or oil mill.
13. Fish smoking, curing or canning.
14. Freight classification yard.
15. Iron or steel foundry or fabrication plant and heavyweight casting.
16. Lamp black manufacture.
17. Oilcloth or linoleum manufacture.
18. Oil drilling and production of oil, gas or hydro-carbons.
19. Ore reduction.
20. Paint, oil (including linseed), shellac, turpentine, lacquer or varnish manufacture.
21. Paper and pulp manufacture.
22. Petroleum products manufacture or wholesale storage of petroleum.
23. Plastic manufacture.
24. Potash works.
25. Pyroxyline manufacture.
26. Quarry or stone mill.
27. Railroad repair shops.

28. Rock, sand or gravel distribution; rock, sand or gravel excavating or crushing, subject to conditions and methods of operation approved by the Administrator as provided for in Sec. 12.26-D.

29. Rolling mills.

30. Rubber or gutta-percha manufacture or treatment.

31. Salt works.

32. Soap manufacture.

33. Sodium compounds manufacture.

34. Stove or shoe polish manufacture.

35. Tar distillation or tar products manufacture.

36. Wool pulling or scouring.

37. And in general those uses which may be obnoxious or offensive by reason of emission of odor, dust, smoke, gas, noise, vibration, and the like; provided, however, that none of the following uses shall be located nearer than five hundred (500) feet to a more restricted zone:

(a) Acid manufacture.

(b) Automobile wrecking area.

(c) Cement, lime, gypsum or plaster of paris manufacture.

(d) Distillation of bones.

(e) Drop forge industries manufacturing forgings with power hammers.

(f) Explosives, manufacture or storage, subject to provisions of Sec. 54.75, Los Angeles Municipal Code.

(g) Fat rendering, except as an incidental use.

(h) Fertilizer manufacture.

- (i) Garbage, offal or dead animal reduction or dumping.
- (j) Gas manufacture.
- (k) Glue manufacture.
- (l) Petroleum refining.
- (m) Smelting of tin, copper, zinc or iron ores.
- (n) Stock yards or feeding pens.
- (o) Slaughter of animals, subject to provisions of Ord. No. 10,909 (N.S.).
- (p) Tannery or the curing or storage of raw hides.
- (q) Storage, sorting, collecting or baling of rags, paper, iron or junk.

38. Uses customarily incident to any of the above uses and accessory buildings when located on the same lot.

39. Automobile parking space, for buildings other than dwellings, as required in Sec. 12.21-A, 4.

40. Loading space as required in Sec. 12.21-A, 5.

B. Height—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained to exceed thirteen (13) stories or one hundred-fifty (150) feet in height; provided, however, that where any such building, structure or enlargement exceeds a height of eight (8) stories or one hundred (100) feet, that portion thereof above said height shall be set back from the required yard lines, or lot lines where no yards are required, at least one (1) foot for each four (4) feet of height above eight (8) stories or one hundred (100) feet.

Exceptions to Height regulations are provided for in Sec. 12.22-B.

C. Area—No building or structure nor the enlargement of any building or structure shall be hereafter erected or maintained unless the following yards and lot areas are provided and maintained in connection with such building, structure or enlargement:

1. Front Yard—Not required.
2. Side Yards—Where the side of a lot in the “M3” Zone abuts upon the side of a lot in an “A,” “RA” or “R” Zone, there shall be a side yard of not less than ten (10) per cent of the width of the lot but such side yard need not exceed five (5) feet and shall not be less than three (3) feet in width. In all other cases, a side yard for a commercial or industrial building shall not be required, but if provided, it shall not be less than three (3) feet in width.
3. Rear Yard—No rear yard shall be required except where the “M3” Zone abuts upon an “A,” “RA” or “R” Zone, in which case there shall be a rear yard of not less than twenty (20) per cent of the depth of the lot but such rear yard need not exceed twenty (20) feet for interior lots nor ten (10) feet for corner lots.

Exceptions to Area regulations are provided for in Sec. 12.22-C.

Sec. 12.21—General Provisions

A. Use.

1. Conformance and Permits Required—No building or structure shall be erected, reconstructed, structurally altered, enlarged, moved, or maintained, nor shall any building, structure or land be used or designed to be used for any use other than is permitted in the zone in which such building, structure or land is located and then only after applying for and securing all permits and licenses required by all laws and ordinances.

2. Other Uses Determined by Administrator—Where the term “other uses similar to the above” is mentioned, it shall be deemed to mean other uses which, in the judgment of the Administrator as evidenced by a written decision, are similar to and not more objectionable to the general welfare, than the uses listed in the same Section. Any “other uses” so determined by the Administrator shall be regarded as listed uses. In no instance, however, shall the Administrator determine, nor shall these regulations be so interpreted, that a use shall be permitted in a zone when such use is specifically listed as first permissible in a less restricted Zone; i.e., a use specifically listed in the “C2” Zone shall not be permitted in the “C1” Zone.

3. Zone Group Classification—Whenever the terms “A” Zone, “R” Zone, “C” Zone or “M” Zone are used, they shall be deemed to refer to all zones containing the same letters in their names (except “RA” Suburban and “CM” Business Zones); i.e., “C” Zone shall include the “C1,” “C2,” “C3,” “C4” Zones.

4. Automobile Parking Space—There shall be provided at the time of the erection of any main building or structure or at the time any main building or structure is enlarged or increased in capacity, minimum off-street parking space with adequate provisions for ingress and egress by standard size automobiles as follows:

(a) Private Garages for Dwellings—In all “R” Zones, including the “RA” Zone, there shall be at least one (1) permanently maintained parking space in a private garage on the same lot with the main building or the enlargement of a main building, for each dwelling unit in the case of a new building or for each dwelling unit added to an existing building. Such parking space shall not be less than eight (8) feet wide, eighteen (18) feet long and seven (7) feet high. A private garage shall not have a capacity for more than two (2) passenger automobiles for each dwelling unit unless the lot, whereon such garage is located, has an area of two thousand (2000) square feet for each parking space in such garage.

(b) Parking Space for Dwellings—In the “C,” “CM,” “M1” and “M2” Zones, there shall be at least one (1) permanently maintained parking space on the same lot with the main building or the enlargement of a main building, for each dwelling unit in the case of a new building or for each dwelling unit added to an existing building or in lieu thereof such parking space shall be provided in a building

as required in Subparagraph (a) of this Paragraph. Such parking space shall have not less than one hundred twenty-six (126) square feet net area.

(c) For Buildings Other Than Dwellings—For a new building or structure or for the enlargement or increase in seating capacity, floor space or guest rooms of any existing main building or structure, there shall be at least one (1) permanently maintained parking space of not less than one hundred twenty-six (126) square feet net area, as follows:

(1) For church, high school, college and university auditoriums and for theaters, general auditoriums, stadiums and other similar places of assembly, at least one (1) parking space for every ten (10) seats provided in said buildings or structures.

(2) For hospitals and welfare institutions, at least one (1) parking space for every one thousand (1000) square feet of floor area in said buildings.

(3) For hotels, apartment hotels and clubs, at least one (1) parking space for each of the first twenty (20) individual guest rooms or suites; one (1) additional parking space for every four (4) guest rooms or suites in excess of twenty (20), but not exceeding forty (40); and one (1) additional parking space for every six (6) guest rooms or suites in excess of forty (40) guest rooms or suites provided in said buildings.

(4) For tourist courts, at least one (1) parking space for each individual sleeping or living unit.

(5) For business or commercial buildings or structures having a floor area of seventy-five hundred (7500) square feet or more, at least one (1) parking space for every one thousand (1000) square feet of gross floor area in said buildings or structures, excluding automobile parking space.

Parking space as required above shall be on the same lot with the main building or structure or located not more than fifteen hundred (1500) feet therefrom.

5. Loading Space—Every hospital, institution, hotel, commercial or industrial building hereafter erected or established on a lot which abuts upon an alley or is surrounded on all sides by streets, shall have one (1) permanently maintained loading space of not less than ten (10) feet in width, twenty (20) feet in length measures perpendicularly to the alley, and fourteen (14) feet in height, for each two thousand (2000) square feet of lot area upon which said building is located; provided, however, that not more than two (2) such spaces shall be required, unless the building on such lot has a gross floor area of more than eighty thousand (80,000) square feet, in which case there shall be one (1) additional loading space for each additional forty thousand (40,000) square feet (in excess of eighty thousand (80,000) square feet) or fraction thereof above ten thousand (10,000) square feet.

6. Public Parking Areas — Automobile and Trailer Sales Areas—Every parcel of land hereafter used as a public parking area or automobile and trailer sales area shall be developed as follows, subject to the approval of plans thereof by the Administrator:

(a) Such area shall be paved with an asphaltic or concrete surfacing; shall have appropriate bumper guards where needed, and shall be properly enclosed with an ornamental fence, wall or compact eugenia or other evergreen hedge, having a height of not less than two (2) feet and maintained at a height of not more than six (6) feet. Such fence, wall or hedge shall be maintained in good condition and observe the required front yard and the required side yard along the street side of a corner lot for the zone in which it is located and such required front and side yard shall be landscaped with evergreen ground cover and properly maintained.

(b) Where such area adjoins the side of a lot in an "A," "RA" or "R" Zone, a six (6) foot masonry wall shall be erected and maintained at least five (5) feet from the side of such lot, and suitable landscaping shall be planted and maintained in the space between the parking lot wall and the adjoining property. Provided, however, that such wall shall not extend into the front yard required on the lot on which it is located.

(c) Any lights used to illuminate said parking areas shall be so arranged as to reflect the

light away from adjoining premises in an "A," "RA" or "R" Zone.

B. Height.

1. Height Conformance—Except as hereinafter provided:

(a) No building or structure nor the enlargement of any building or structure shall be hereafter erected, reconstructed or maintained which exceeds the height limit established for the zone wherein such building or structure is located.

C. Area

1. Area Requirements—Except as hereinafter provided, no building or structure nor the enlargement of any building or structure shall be hereafter erected, located or maintained on a lot unless such building, structure or enlargement conforms with the area regulations of the zone in which it is located:

(a) No parcel of land held under separate ownership at the time this Article became effective, shall be reduced in any manner below the minimum lot area, size or dimensions required by this Article.

(b) No lot area shall be so reduced, diminished and maintained that the yards, other open spaces or total lot area, shall be smaller than prescribed by this Article, nor shall the density of population be increased in any manner except in conformity with the regulations herein established.

(c) No required yard or other open space around an existing building, or which is here-

after provided around any building for the purpose of complying with the provisions of this Article, shall be considered as providing a yard or open space for any other building; nor shall any yard or other required open space on an adjoining lot be considered as providing a yard or open space on a lot whereon a building is to be erected.

(b) Every building hereafter erected shall be located on a lot as herein defined. In no case shall there be more than one (1) main residential building and its accessory buildings on one (1) lot. Group dwellings, court apartments, row dwellings, and a unit group of dwellings as referred to in Paragraph 2 of this Sub-section, may be considered as one (1) main residential building.

(e) No building permit shall be issued for a building or structure on a lot which abuts a street dedicated to a portion of its required width and located on that side thereof from which no dedication was secured, unless the yards provided on such lot include both that portion of the lot lying within the future street and the required yards.

(f) No building permit shall be issued for a building or structure on a corner lot when such building or structure is to be oriented in such a manner as to reduce the front yard requirement on the street on which such corner lot has its frontage at the time this Article became effective.

(g) Every required front, side and rear yard shall be open and unobstructed from the ground to the sky.

(h) At each end of a through lot there shall be a front yard of the depth required by this Article for the zone in which each street frontage is located; provided, however, that one of such front yards may serve as a required rear yard.

2. Group Dwellings Rearing on Side Yards—Dwellings may be arranged to rear upon side yards or have their service entrances opening thereon, provided the following regulations are complied with:

(a) In the case of group dwellings or court apartments, the required side yards shall be increased by six (6) inches for each dwelling unit or portion thereof abutting such side yard, but said side yard need not exceed seven (7) feet, except that for court apartments more than three (3) stories in height each side yard shall be increased one (1) foot in width for each additional story above the third story. The average width of the court shall not be less than three (3) times the width of the side yard required in this provision.

(b) In the case of row dwellings or a unit group of dwellings (including one-family, two-family or multiple dwellings not more than two and one-half (2½) stories in height) arranged so as to rear upon one side yard and front upon the other, the side yard upon which the dwell-

ings rear shall be increased by six (6) inches for each dwelling unit or portion thereof abutting such side yard, but said side yard need not exceed seven (7) feet. The average width of the side yard upon which the dwellings front shall not be less than one and one-half ($1\frac{1}{2}$) times the width of the other side yard, as required above.

(c) In the grouping of dwellings as permitted in this paragraph, the minimum distance between detached dwellings shall not be less than ten (10) feet, and the front and rear yard requirements for lots in the zone in which such dwellings are located, shall be complied with.

3. Yards for Institutions, Churches, Etc.—In the “R” Zones, no building shall be hereafter erected, enlarged or used for:

(a) An institution, hospital or other similar use permitted under the use regulations of this Article, unless such buildings are located at least twenty-five (25) feet from the lot or boundary line of adjoining property in any “R” Zone; and no required front or side yard is used for the parking of automobiles. Provided, however, that where a lot has a width of less than one hundred and twenty-five (125) feet and was held under separate ownership or was of record at the time this Article became effective, the above yard requirement on each side of such buildings may be reduced to twenty (20) per cent of the width of the lot, but in no case less than ten (10) feet.

(b) A church, library or museum, unless such buildings are located at least ten (10) feet from the side lot lines and unless the total combined width of the two side yards is equal to forty (40) per cent or more of the width of the lot but such combined side yard width need not exceed fifty (50) feet.

In the case of a church, library or museum, the parking of automobiles shall be permitted in the side and rear yards, provided such parking is not located (1) nearer than five (5) feet to the side lot line of an interior lot; (2) on the street side of a reversed corner lot; and (3) beyond the front line of the main building. Further, all automobile parking areas and driveways shall be paved with an asphaltic or concrete surfacing and shall have appropriate bumper guards where needed. All other open spaces including an area with an average width of three (3) feet or more adjacent to the main building, shall be fully landscaped with suitable ground cover, trees or shrubs.

4. Lot Area—Tourist Courts—A tourist court, wherever permitted under the regulations of this Article, shall have a lot area of not less than eight hundred (800) square feet for each individual sleeping or living unit.

Sec. 12.22—Exceptions

A. Use.

1. **Private Garage Not Required—Topography—**Where a lot abuts upon a street or place which due to topographic conditions or excessive grades is not accessible by automobile, and such lot is to be occupied by not more than a one-family dwelling, no private garage shall be required.

2. **Public Utilities and Public Services—**The provisions of this Article shall not be so construed as to limit or interfere with the construction, installation, operation and maintenance for public utility purposes, of water and gas pipes, mains and conduits, electric light and electric power transmission and distribution lines, telephone and telegraph lines, oil pipe lines, sewers and sewer mains, and incidental appurtenances.

B. Height.

1. **Three-story Buildings—Two and One-half Story Zones—**In the zones limiting the height to two and one-half ($2\frac{1}{2}$) stories or thirty-five (35) feet, one family dwellings, churches, or schools may be increased in height to three (3) stories or forty-five (45) feet, provided the required side yards are increased to twelve (12) feet or more in width.

2. **Buildings Exceeding Three Stories—Three Story Zone—**In the zones limiting the height to three (3) stories or forty-five (45) feet, public or quasi-public buildings, churches, schools, hospitals or sanitariums may be erected to a height not exceeding six (6) stories or seventy-five (75) feet,

and motion picture studio stages, scene or sky-backings, temporary towers, and the like may be erected to a height not exceeding one hundred twenty-five (125) feet, when the required front, side and rear yards are increased an additional foot for each four (4) feet such building or structure exceeds three (3) stories or forty-five (45) feet in height.

3. Lots on Downhill Slope—On any lot, sloping downhill from the street, which has an average ground slope on that portion of the lot to be occupied by the main building, of twenty-five (25) per cent or more (measured in the general direction of the side lot lines), an additional story may be permitted in such main building, provided the ceiling of the lowest story shall not be more than two (2) feet above the average curb level along the front of the lot.

4. Sloping Lots in "CM" Zone—In the "CM" Zone any building hereafter erected or structurally altered on sloping ground may exceed the maximum height limit in so far as such additional height may be required to overcome differences in adjoining sidewalk or ground elevations, but no building shall exceed a height of one hundred-fifty (150) feet, measured from the highest point of the adjoining sidewalk level on at least one street frontage, nor shall any such building exceed a height of one hundred sixty-five (165) feet measured from any other point of adjoining sidewalk level. No building shall have more than thirteen (13) stories, counting the story on the main floor level, but not counting the basement stories.

5. Through Lots (150 feet or less in depth)—On through lots one hundred-fifty (150) feet or less in depth, the height of a building may be measured from the adjoining curb level on either street.

6. Through Lots (more than 150 feet in depth)—On through lots more than one hundred-fifty (150) feet in depth, the height regulations and basis of height measurements for the street permitting the greater height shall apply to an depth of not more than one hundred-fifty (150) feet from that street; provided, however, that this provision shall not be so interpreted as to permit a greater height than that allowed in Paragraph 4 above.

7. Structures Permitted Above Heights Limit—Penthouses or roof structures for the housing of elevators, stairways, tanks, ventilating fans or similar equipment required to operate and maintain the building, and fire or parapet walls, skylights, towers, steeples, roof signs, flagpoles, chimneys, smokestacks, wireless masts, water tanks, silos, or similar structures may be erected above the height limits herein prescribed but no penthouse or roof structure, or any space above the height limit shall be allowed for the purpose of providing additional floor space.

8. Industrial Buildings Exceeding Height Limit—In the “M2” or “M3” Zones a manufacturing or industrial building or structure may exceed the height limit therein when authorized by ordinance pursuant to the provisions of Sec. 3, 11 (b) of the City Charter.

C. Area.

1. Building Lines—Where a Building Line or Setback Line has been established by ordinance, the space between such Building or Setback Line and the front or side lot line may be used as a front or side yard, as the case may be, in lieu of the front or side yard required by this Article.

2. Frontage Optional—Corner Building—In the “C,” “CM” or “M” Zones, where property fronts upon one street and sides upon another street, a building may be arranged to front upon either street, if a yard is provided at the rear of such building, having a depth of not less than twenty (20) per cent of the depth of the lot measured at right angles to the street upon which the building fronts but such yard need not exceed ten (10) feet. Provided, further, that where a commercial or industrial building sides upon the side of a lot in the “A,” “RA” or “R” Zone the side yard regulations of the zone in which the property is located shall apply.

3. Yard Regulations Modified—Where the yard regulations cannot reasonably be complied with or their application determined on lots of peculiar shape or location or on hillside lots, such regulations may be modified or determined by the Administrator, as provided for in Sec. 12.26-B, 1.

4. Front Yard—Between Projecting Buildings—Where a lot is situated between two lots, each of which has a main building (within [51] twenty-five (25) feet of its side lot lines) which projects beyond the established front yard line and has been so maintained since this Article became effec-

tive, the front yard requirement on such lot may be the average of the front yards of said existing buildings.

5. Front Yard—Adjoining Projecting Building—Where a lot adjoins only one lot having a main building (within twenty-five (25) feet of its side lot lines) which projects beyond the established front yard line and has been so maintained since this Article became effective, the front yard requirement on such lot may be the average of the front yard of the said existing building and the established front yard line.

6. Front Yard—Sloping Lot.—Where the elevation of the ground at a point fifty (50) feet from the front line of a lot and midway between the side lines, differs ten (10) feet or more from the curb level, or where the slope (measured in the general direction of the side lot lines) is twenty (20) per cent or more on at least one-quarter ($\frac{1}{4}$) of the depth of the lot, the front yard need not exceed fifty (50) per cent of that required in the zone. A private garage, not exceeding one story nor fourteen (14) feet in height, may be located in such front yard, provided every portion of the garage building is at least five (5) feet from the front lot line and does not occupy more than fifty (50) per cent of the width of the front yard.

7. Front and Side Yards Waived—The front and side yards shall be waived for dwellings, hotels, and boarding or lodging houses, erected above the ground floor of a building when said ground floor is designed exclusively for commercial or industrial purposes.

8. Front and Side Yards—Unit Development—Where an entire frontage in an “R1” Zone is designed and developed as a unit, the following provisions shall apply: (a) the front yard requirement may be varied by not more than five (5) feet in either direction (i.e., from twenty (20) to thirty (30) feet in the case of a required front yard of twenty-five (25) feet) provided the average front yard for the entire frontage is not less than the minimum front yard required in the zone; and (b) the side yard requirements may also be varied, provided that the total combined width of the two side yards on a lot is not less than that required for lots in the zone, that no side yard shall be less than three (3) feet, and that the minimum distance between the sides of buildings shall not be less than ten (10) feet.

9. Side Yard Waived—For the purpose of side yard regulations, the following dwellings with common party walls shall be considered as one (1) building occupying one (1) lot; semi-detached two and four-family dwellings, row dwellings, group dwellings and court apartments.

10. Rear Yard—Includes One-Half Alley—In computing the depth of a rear yard where such yard opens onto an alley, one-half ($\frac{1}{2}$) the width of such alley may be assumed to be a portion of the required rear yard.

11. Rear Yard—Includes Loading Space—Loading space provided in accordance with this Article may occupy a required open rear yard.

12. Rear and Side Yard—Accessory Building—An accessory building, not exceeding one (1) story nor fourteen (14) feet in height, may occupy not more than fifty (50) per cent of the area of a required rear yard, provided that (a) in the “R1” and “R2” Zones, where a portion of such accessory building is located directly in the rear of a main building, it shall be not less than fifteen (15) feet therefrom; (b) in the “R3,” “R4” and “R5” Zones, where a portion of such accessory building is located directly in the rear of a main building, it shall be not less than ten (10) feet therefrom; (c) in the “R1” to “R5” Zones inclusive, where such accessory building is so located in the rear yard that no portion thereof is directly in the rear of a main building, it shall be not less than five (5) feet therefrom; and (d) in the “R1” and “R2” Zones such accessory building or portion thereof may be located at the side of a main building if situated not less than seventy (70) feet from the front lot line and five (5) feet from both the main building and the side lot line.

In no case, however, shall a two (2) story accessory building occupy any part of a required rear yard nor be located nearer than five (5) feet to any lot line.

14. Yards for Buildings Affected by Street Widening—Where a building or structure is located on property acquired for public use (by condemnation, purchase or otherwise), such building or structure may be relocated on the same lot or premises,

although the area regulations of this Article cannot reasonably be compiled with. Further, where any part of such a building or structure is acquired for public use, the remainder of such building or structure may be repaired, reconstructed or remodeled with the same or similar kind of materials as used in the existing building.

14. Additional Dwelling—Front of Lot—Where a dwelling is located on the rear one-half ($1\frac{1}{2}$) of a lot at the time this Article became effective, an additional dwelling shall be permitted on the front portion of said lot, provided (a) that the lot area requirements are complied with for the zone in which the property is located, except in the “R1” Zone, in which case the lot area requirement shall be twenty-five hundred (2500) square feet in lieu of five thousand (5000) square feet; (b) that the height and required front and side yard regulations shall be observed and the minimum distance between the front of the rear building and the rear of the front building shall not be less than twenty-five (25) feet; and (c) that wherever a building is erected on the front portion of said lot, no structural alterations shall thereafter be made in the rear dwelling and whenever said rear dwelling is damaged to the extent of more than seventy-five (75) per cent of its value or for any reason removed, it shall not be reconstructed or replaced.

15. Additional Dwelling—Large Lot—Where a lot has an area equivalent to two (2) or more times that required by this Article, but without sufficient required frontage for two (2) or more lots, a

dwelling shall be permitted on both the front and rear portions of said lot, provided (a) that all eight and area requirements, except lot width, are complied with; (b) that a strip of land thirty (30) feet wide adjacent to and measured at right angles from the rear lot line, is reserved for future access in addition to the required rear yard; and (c) that a strip of land at least fifteen (15) feet wide, measured at right angles to either side lot line and extending from the street line to the rear portion of the lot, is reserved as a means of access thereto.

16. Lot Area—Includes One-Half Alley — In computing the lot area of a lot which abuts upon one or more alleys, one-half ($\frac{1}{2}$) the width of such alley or alleys may be assumed to be a portion of the lot.

17. Lot Area Acreage — Includes One-Half Street—In computing the lot area of a lot in the “A1,” “A2” and “RA” Zones, that portion of the width of all abutting streets or highways, which would normally revert to the lot if the street were vacated, may be assumed to be a portion of the lot.

18. Through Lot—Accessory Building—Where a through lot has depth of less than one-hundred-fifty (150) feet, an accessory building not exceeding one (1) story nor fourteen (14) feet in height, may be located in one of the required front yards, if such building is set back from the front lot line a distance of not less than ten (10) per cent of the depth of the lot and at least five (5) feet from any side lot line. Such accessory building shall not project beyond the front yard line of an existing main

building along the frontage, except that such building need not be located more than twenty-five (25) feet from the street line.

19. Through Lot—Bay Be Two Lots—Where a through lot has a depth of one hundred-fifty (150) feet or more, said lot may be assumed to be two lots with the rear line of each approximately equidistant from the front lot lines, provided all area requirements are complied with. An accessory building shall not project beyond the front yard line of an existing main building along the frontage, except that such accessory building need not be located more than twenty-five (25) feet from the street line.

20. Projections Into Yards

(a) A porte cochere may be permitted over a driveway in a side yard, provided such structure is not more than one (1) story in height and twenty (20) feet in length, and is entirely open on at least three (3) sides, except for the necessary supporting columns and customary architectural features.

(b) Cornices, eaves, belt courses, sills, canopies or other similar architectural features (not including bay windows or vertical projections), may extend or project into a required side yard not more than two (2) inches for each one (1) foot of width of such side yard and may extend or project into a required front or rear yard not more than thirty (30) inches. Chimneys may also project into a required front, side or rear yard not more than one (1) foot,

provided the width of such side yard is not reduced to less than three (3) feet.

(c) Fire escapes may extend or project into any front, side or rear yard not more than four (4) feet.

(d) Open, unenclosed stairways or balconies, not covered by a roof or canopy, may extend or project into a required rear yard not more than four (4) feet, and such balconies may extend into a required front yard not more than thirty (30) inches.

(e) Open, unenclosed porches, platforms or landing places, not covered by a roof or canopy, which do not extend above the level of the first floor of the building, may extend or project into any front, side or rear yard not more than six (6) feet.

(f) Open, unenclosed porches, platforms or landing places, not covered by a roof or canopy, which do not extend above the level of the first floor of the building, may extend or project into a court a distance of not more than twenty (20) per cent of the width of such court, but in no case more than six (6) feet.

(g) Openwork ornamental fences, hedges, landscape architectural features or guard railings for safety protection around depressed ramps, may be located in any front, side or rear yard if maintained at a height not more than three and one-half ($3\frac{1}{2}$) feet above the average ground level adjacent thereto. Provided, further, that an openwork type railing

not more than three and one-half ($3\frac{1}{2}$) feet in height may be installed or constructed on any balcony, stairway, porch, platform or landing place mentioned above in Subparagraphs (d), (e) and (f).

(h) A fence, lattice-work screen or wall, not more than six (6) feet in height, or a hedge or thick growth of shrubs or trees, maintained so as not to exceed six (6) feet in height, may be located in any required front yard in the "A" or "RA" Zones and in any required side or rear yard, provided that in the "R" Zones they do not extend into the required front yard nor into the side yard required along the side street on a corner lot, which in this case shall also include that portion of the rear yard abutting the intersecting street wherein accessory buildings are prohibited. Provided, further, that this provision shall not be so interpreted as to prohibit the erection of an open mesh type fence enclosing an elementary or secondary school site.

(i) Landscape features, such as trees, shrubs, flowers or plants shall be permitted in any required front, side or rear yard, provided they do not produce a hedge effect contrary to the provisions of Subparagraph (g) above.

(j) Name plates, bulletin boards, or signs appertaining to the prospective sale, lease or rental of the premises on which they are located, as permitted in this Article, shall be allowed in any required front, side or rear yard.

(k) The above structures or features, however, shall not be located and maintained so as to preclude complete access at all times about a main building. Provided that gates or other suitable openings at least two and one-half (2½) feet in width shall be deemed adequate for such access.

(l) See also Sec. 12.26-A, 1, (i).

Sec. 12.23—Nonconforming Buildings and Uses.

A. Nonconforming Buildings

1. Maintenance Permitted—A nonconforming building or structure may be maintained, except as otherwise provided in this Section.

2. Repairs—Alterations — Repairs and Alterations may be made to a nonconforming building or structure, provided that in a building or structure, which is nonconforming as to use regulations no structural alterations shall be made except those required by law or ordinance.

3. Additions—Enlargements—Moving

(a) A building or structure nonconforming as to use regulations shall not be added to or enlarged in any manner unless such building or structure, including such additions and enlargements is made to conform to all the regulations of the zone in which it is located.

(b) A building or structure nonconforming as to height or area regulations shall not be added to or enlarged in any manner unless such addition and enlargement conforms to all the regulations of the zone in which it is located.

Provided, that the total aggregate floor area included in all such separate additions and enlargements does not exceed fifty (50) per cent of the floor area contained in said building or structure and that the total aggregate value of all such separate additions and enlargements does not exceed the assessed value of said building or structure at the time it became nonconforming.

(c) A building or structure lacking sufficient automobile parking space in connection therewith as required in Sec. 12.21-A, 4, may be altered or enlarged to create additional dwelling units in the case of dwellings, seats in the case of churches, auditoriums, theaters, stadiums, and other similar places of assembly; floor area in the case of hospitals, institutions, business or commercial buildings; guest rooms in the case of hotels and clubs; and sleeping or living units in the case of tourist courts, provided additional automobile parking space is supplied to meet the requirements of Sec. 12.21-A, 4, for such additional dwelling units, seats, floor area or guest rooms as the case may be.

(d) No nonconforming building or structure shall be moved in whole or in part to any other location on the lot unless every portion of such building or structure is made to conform to all the regulations of the zone in which it is located.

4. Restoration Damaged Buildings—A nonconforming building or structure which is damaged or

partially destroyed by fire, flood, wind, earthquake, or other calamity or act of God or the public enemy, to the extent of not more than seventy-five (75) per cent of its value at that time, may be restored and the occupancy or use of such building, structure or part thereof, which existed at the time of such partial destruction, may be continued or resumed, provided the total cost of such restoration does not exceed seventy-five (75) per cent of the value of the building or structure at the time of such damage and that such restoration is started within a period of one (1) year and is diligently prosecuted to completion. In the event such damage or destruction exceeds seventy-five (75) per cent of the value of such nonconforming building or structure, no repairs or reconstruction shall be made unless every portion of such building or structure is made to conform to all regulations for new buildings in the zone in which it is located.

5. One Year Vacancy—A building, structure or portion thereof, nonconforming as to use, which is, or hereafter becomes vacant and remains unoccupied for a continuous period of one (1) year, shall not thereafter be occupied except by a use which conforms to the use regulations of the zone in which it is located.

6. Removal—In all “R” Zones, every nonconforming building or structure which was designed, arranged or intended for a use permitted only in the “C,” “CM” and “M” Zones or in the “A” or “RA” Zones but not in the “R” Zones, shall be completely removed, or altered and converted to a conforming building, structure and use when such

buildings or structures have reached, or may hereafter reach, the ages hereinafter specified, computed from the date the building was erected. In the case of buildings defined in the Los Angeles City Building Code as, Class I and II, forty (40) years; Class III and IV, thirty (30) years; and Class V, twenty (20) years. Provided, however, that this regulation shall not become operative until twenty (20) years from the effective date of this Article.

7. Plans Filed—Building Permits—In any case where plans and specifications have been filed with the Department of Building and Safety prior to the effective date of this Article, which plans and specifications are for a building or structure which would conform with the zoning regulations effective at the date of such filing, but not with the regulations of this Article, a building permit for such building or structure shall be issued and any building or structure constructed in accordance therewith shall be deemed to be a nonconforming building or structure within the meaning of this Article; provided, however, that this Paragraph shall apply only in the event that construction on such building or structure is commenced within thirty (30) days after the issuance of said permit and diligently prosecuted to completion.

B. Nonconforming Use of Buildings

1. Continuation and Change of Use—Except as otherwise provided in this Section, (a) the nonconforming use of a building or structure, existing at the time this Article became effective, may be con-

tinued; (b) the use of a nonconforming building or structure may be changed to a use or the same or more restricted classification, but where the use of a nonconforming building or structure is hereafter changed to a use of a more restricted classification it shall not thereafter be changed to a use of a less restricted classification; and (c) a vacant nonconforming building or structure may be occupied by a use for which the building or structure was designed or intended if so occupied within a period of one (1) year after the effective date of this Article, and the use of a nonconforming building or structure which becomes vacant after the effective date of this Article, may also be occupied by a use for which the building or structure was designed or intended if so occupied within a period of one (1) year after the building becomes vacant.

2. Expansion Prohibited—A nonconforming use of a building or structure conforming to the use regulations, shall not be expanded or extended into any other portion of such conforming building or structure nor changed except to a conforming use. If such a nonconforming use or portion thereof is discontinued or changed to a conforming use, any future use of such building, structure or portion thereof shall be in conformity with the regulations of the zone in which such building or structure is located. Provided, however, that all nonconforming uses of buildings or structures conforming to the use regulations shall be discontinued not later than five (5) years from the effective date of this Article.

C. Nonconforming Use of Land

1. Continuation of Use—The nonconforming use of land (where no building is involved), existing at the time this Article became effective, may be continued for a period of not more than five (5) years therefrom, provided:

(a) That no such nonconforming use of land shall in any way be expanded or extended either on the same or adjoining property.

(b) That if such nonconforming use of land or any portion thereof is discontinued or changed, any future use of such land shall be in conformity with the provisions of this Article.

(c) That any sign, billboard, commercial advertising structure or statuary, which lawfully existed and was maintained at the time this Article became effective, may be continued, although such use does not conform with the provisions hereof; provided, however, that no structural alterations are made thereto and provided, further, that all such nonconforming signs, billboards, commercial advertising structures and statuary, and their supporting members, shall be completely removed from the premises not later than five (5) years from the effective date of this Article.

(d) That under no circumstances shall a well for the production of oil, gas or other hydro-carbon substances, which is a nonconforming use under the provisions hereof, be redrilled or deepened.

(e) Nothing herein shall preclude the use of property in any zone for the annual sale of "Christmas trees and ornaments" between December first and twenty-fifth inclusive, provided such use is conducted so as not to be detrimental to the neighborhood.

D. Nonconforming Due to Reclassification

1. The foregoing provisions of this Section shall also apply to buildings, structures, land or uses which hereafter become non-conforming due to any reclassification of zones under this Article or any subsequent change in the regulations of this Article; provided, however, that where a period of years is specified in this Section for the removal of non-conforming buildings, structures or uses, said period shall be computed from the date of such reclassification or change.

Sec. 12.24—Conditional Uses Permitted by Commission

A. Location of Permitted Uses—Wherever it is stated in this Article that the following uses may be permitted in a zone if their location is first approved by the Commission, said uses are deemed to be a part of the development of the Master Plan or its objectives and shall conform thereto. Before the Commission makes its final determination a public hearing by the Commission shall be mandatory for certain uses and optional for others:

1. Uses for which at least one public hearing shall be held include: airports or aircraft landing

fields; cemeteries; educational institutions; and golf courses (except driving tees or ranges, miniature courses and similar uses operated for commercial purposes).

2. Uses for which a public hearing is optional include: churches (except rescue mission or temporary revival); schools, elementary and high; and public utilities and public service uses or structures.

B. Additional Uses Permitted—The Commission, after public hearing, may permit the following uses in zones from which they are prohibited by this Article where such uses are deemed essential or desirable to the public convenience or welfare, and are in harmony with the various elements or objectives of the Master Plan:

1. Airports or aircraft landing fields.
2. Cemeteries.
3. Development of natural resources (excluding the drilling for or producing of oil, gas or other hydrocarbon substances) together with the necessary buildings, apparatus or appurtenances incident thereto.
4. Educational institutions.
5. Governmental enterprises (federal, state and local).
6. Libraries or museums, public.
7. Public utilities and public service uses or structures.
8. Large scale neighborhood housing projects, provided they comply with all the yard requirements on the boundary of the property and with the height and lot area regulations of the zone in which

they are located and in no case cover more than forty (40) per cent of the buildable area of the site (excluding accessory buildings).

9. In the "A1," "A2" and "RA" Zones, new self-contained communities with town lot subdivision, provided adequate open spaces and municipal facilities, utilities and services are made available in a manner satisfactory to the Commission. Upon the approval of the location and design of any such self-contained community, the Commission shall initiate any rezoning of the affected area which, in its judgment, is necessary or desirable.

Any of the above uses existing at the time this Section became effective, shall be deemed to have been approved by the Commission and nothing in this Section shall be construed to prevent the enlargement of existing buildings for such uses if all other regulations of this Article are complied with, including the conditions of any special district ordinance, exception or variance heretofore granted authorizing such use.

C. Procedure — Written applications for the approval of the uses referred to in this Section shall be filed in the public office of the Department of City Planning upon forms prescribed for that purpose by the Commission.

The procedure for holding public hearings shall be the same as that required in Sec. 12.32-C.

The Commission shall make its findings and determination in writing within forty (40) days from the date of filing of an application and shall forthwith transmit a copy thereof to the applicant. No

decision of the Commission under this Section shall become effective until after an elapsed period of ten (10) days from the date the written determination is made, during which time the applicant, or any other person aggrieved, may appeal therefrom to the City Council in the same manner as provided for in Sec. 12.32-E.

In approving the uses referred to in this Section, the Commission shall have authority to impose such conditions as are deemed necessary to protect the best interests of the surrounding property or neighborhood and the Master Plan.

Sec. 12.25—Conditional Uses Permitted by Administrator

A. Location of Permitted Uses—Wherever it is stated in this Article that the following uses may be permitted in a zone if their location is first approved by the Administrator, said uses are deemed to be essential to the general purpose and intent of the Comprehensive Zoning Plan and shall conform thereto. Before the Administrator makes his final determination he shall hold a public hearing on all such uses including:

1. Philanthropic or correctional institutions; animal hospitals; cattle feed or sales yards; circus quarters or menageries; goat or cattle dairies; and the keeping of more than five (5) swine, in the "A1," "A2" or "RA" Zones.

2. Dog kennels, or riding stables or academies, in the "RA" Zone.

3. Mortuaries or funeral parlors in the "C2," "C3," "C4" or less restricted zones.

4. Trailer camps or public camps in the "C2," "C3," "C4" or less restricted zones.

Any of the above uses existing at the time this Section became effective, shall be deemed to have been approved by the Administrator and nothing in this Section shall be construed to prevent the enlargement of existing buildings for such uses if all other regulations of this Article are complied with, including the conditions of any special district ordinance, exception or variance heretofore granted authorizing such use.

B. Additional Uses Permitted—The Administrator, after public hearing, may permit the following uses in a zone from which they are prohibited by this Article where such uses are deemed essential or desirable to the public convenience or welfare; are in harmony with the general purpose and intent of the Comprehensive Zoning Plan; and are not detrimental to the immediate neighborhood:

1. Columbariums, crematories or mausoleums, other than in cemeteries.

2. Hospitals or sanitariums.

3. Motion picture studios.

4. Nurseries or greenhouses.

5. Parks, playgrounds, or recreational or community centers, privately operated.

6. Philanthropic or correctional institutions.

7. Private schools other than elementary or high.

8. Private clubs, fraternity or sorority houses.

9. Radio or television transmitters.

10. Business or home occupational uses in residential buildings or permitted accessory buildings in the Oil Drilling Districts as defined in Article 3, Chapter 1 of the Los Angeles Municipal Code, one (1) year after the establishment of such districts. Such uses shall be permitted only for the duration of the Oil Drilling District.

11. Professional uses in existing dwellings (excluding multiple dwellings) in the "R4" or "R5" Zones having frontage on primary or secondary highways, as approved by the Commission, provided such dwellings are not enlarged, the residential character of the dwelling is not changed, and no signs are permitted other than those specifically allowed in the zone or by the Administrator.

12. Trailer camps, public camps, or tourist courts, on any property having frontage on a Federal or State highway.

C. Procedure—Written applications for the approval of the above uses shall be filed in the public office of the Department of City Planning upon forms prescribed for that purpose by the Administrator.

The procedure for holding public hearings shall be the same as that required in Sec. 12.32-C.

The Administrator shall make his findings and determination in writing within forty (40) days from the date of filing of any application and shall forthwith transmit a copy thereof to the applicant. No decision of the Administrator under this Section shall become effective until after an elapsed period of ten (10) days from the date the written

determination is made, during which time the applicant, or any person aggrieved, may appeal therefrom to the Board in the same manner as hereafter provided for in Sec. 12.27.

In approving the uses referred to in this Section, the Administrator shall have authority to impose such conditions as are deemed necessary to protect the best interest of the surrounding property or neighborhood and the Comprehensive Zoning Plan.

Sec. 12.26—Zoning Administrator

A. Variances

1. Authority of Administrator—Where practical difficulties, unnecessary hardships or results inconsistent with the general purposes of this Article may result from the strict and literal interpretation and enforcement of the provisions thereof, the Administrator, upon receipt of a verified application from the owner or lessee of the property affected, stating fully the grounds of the application and facts relied upon, shall have authority to grant, upon such conditions and safeguards as he may determine, such variances therefrom as may be in harmony with their general purpose and intent, so that the spirit of this Article shall be observed, public safety and welfare secured, and substantial justice done, as follows:

- (a) Permit the extension of an existing or proposed conforming use into an adjoining more restricted zone.

(b) Permit a building or use, on a lot immediately adjoining or across an alley from a less restricted zone, upon such conditions and safeguards as will tend to cause an effective transition from the less restricted to the more restricted zone.

(c) Permit an appropriate development or use on a lot which adjoins a building or use existing by virtue of a zone variance or exception granted prior to the effective date of this Article, but in no case shall such development or use extend more than sixty (60) feet from the adjoining lot line of said existing building or use.

(d) Permit in the "A," "RA" or "R" Zones, public parking areas or storage garages adjacent to any existing or proposed use in the multiple dwelling, commercial or industrial zones.

(e) Permit the addition or enlargement of a building or structure, nonconforming as to use regulations, provided such addition or enlargement complies with all height and area regulations of the zone in which it is located and that the total aggregate floor area included in all such separate additions or enlargements does not exceed fifty (50) per cent of the floor area contained in said building or structure, and that the total aggregate value of all such separate additions or enlargements does not exceed the assessed value of said building or structure at the time it became nonconforming.

Provided, further, that no such addition or enlargement shall be permitted which tends to prolong the life of the original building or structure and that such addition or enlargement shall be removed not later than the original building as required in Sec. 12.23-A, 6.

(f) Permit, in the "R1," "R2," "R3" and "R4" Zones, a transitional use on a lot adjoining a building nonconforming as to use, provided such transitional use shall only be a use permitted in the next less restricted zone than the one in which the nonconforming building is located, such as an "R2" use in an "R1" Zone.

(g) Permit the use of a building or portion thereof nonconforming as to use, which has been vacant or unoccupied for a continuous period of one (1) year, for a use other than that permitted in the zone in which such nonconforming building is located, within two (2) years after the termination of the one (1) year vacancy.

(h) Permit a less restricted use in a more restricted zone as follows: any "C" Zone use in any other "C" Zone; any "M1" use in the "C2," "C3" or "C4" Zones; and "M1" use in the "CM" Zone (without limitation on the percent of floor area to be used); any "M2" use in an "M1" Zone; and any "M3" use in an "M2" Zone, provided such use, due to its limited nature, modern devices, or building design, will be no more objectionable than the uses permitted in such zone.

(i) Permit such modification of the height and area regulations as may be necessary to secure an appropriate improvement of a lot.

(j) Permit the modification or waiver of the automobile parking space or loading space requirements where, in the particular instance, such modification or waiver will not be inconsistent with the purpose and intent of this Article.

(k) Permit the modification of the conditions under which specific uses are allowed in certain zones.

(l) Permit in connection with an authorized use, in the "A1," "A2" and "RA" Zones, such commercial or industrial uses as are purely incidental to such authorized use.

(m) Permit temporary buildings and uses for periods of not to exceed two (2) years in undeveloped sections of the City, and for periods of not to exceed six (6) months in developed sections.

(n) Permit in the "M3" Zone the temporary use of areas or portions thereof for dwelling purposes in demountable or other temporary buildings, under appropriate conditions and safeguards, pending the need of the area for industrial purposes, provided suitable sanitary and other facilities can be made available without extra expense to the City.

2. Variance Requirements—No variance shall be granted unless the applicant can produce facts to show that practical difficulties and unnecessary

hardship, within the meaning of the provisions of this Article, would result from the strict compliance with the provisions thereof and, further, no variance shall be granted unless it appears, and the Administrator specifies in his findings the facts which establish beyond a reasonable doubt:

(a) That there are exceptional or extraordinary circumstances or conditions applicable to the property involved or to the intended use of the property, that do not apply generally to the property or class of uses in the same district or zone;

(b) That such variance is necessary for the preservation and enjoyment of a substantial property right of the applicant possessed by other property in the same zone and vicinity;

(c) That the granting of such variance will not be materially detrimental to the public welfare or injurious to the property or improvements in such zone or district in which the property is located; and

(d) That the granting of such variance will not adversely affect the Master Plan.

3. Variance Applications—Form and Contents—Applications for variances as provided in this Section shall be filed with the Administrator in the public office of the Department of City Planning upon forms and accompanied by such data and information as may be prescribed for that purpose by the Administrator so as to assure the fullest practicable presentation of facts for the permanent record. Each such application shall be verified by

the owner or lessee of the property involved attesting to the truth and correctness of all facts and information presented with such application. The Department of City Planning may, upon receipt of the required service charge, prepare any map and property owners list required by the Administrator in his consideration of a variance application.

4. Hearing Date—Notice—Upon the filing of such verified application, the Administrator shall set a reasonable time for considering and hearing the same and shall give notice thereof to the applicant and any other parties at interest. If deemed desirable or expedient so to do, he may set the matter for public hearing and give notice of the time and place of such hearing and the purpose thereof by the method described below. Provided, however, that every application for variance involving a matter coming within the purview of Subparagraphs (a) to (f) inclusive, Paragraph 1 of this Subsection, shall be set for public hearing and notice given of the time, place and purpose thereof by the following method:

(a) By mailing a postal card or letter notice not less than five (5) days prior to the date of such hearing to the owners of all property within three hundred (300) feet of the property involved, using for this purpose the last known name and address of such owners as shown upon the records of the City Clerk. Where all property within the three hundred (300) foot radius is under the same ownership as the property involved in the application,

the owners of all property adjoining that owned by the applicant shall also be notified in the same manner as herein provided.

5. Determination by Administrator—If from the facts presented in connection with the application for variance, at the public hearing or by investigation by or at the instance of the Administrator, he makes the findings set forth in Paragraph 2, Subsection A of this Section and the requested variance comes within the purview of Paragraph 1, Subsection A of this Section, the Administrator may grant the requested variance in whole or in part upon such conditions and safeguards as he may deem proper to preserve the public health, safety, convenience and welfare, the general intent and purposes of these regulations and the Master Plan. If he fails to make the findings set forth in Paragraph 2, Subsection A of this Section, or if in his opinion the granting of the request would be contrary to the intent and purpose of these regulations, the Administrator shall deny the requested variance. The Administrator shall make his findings and determination in writing within forty (40) days from the date of filing of any application, and shall forthwith transmit a copy thereof to the applicant, to the Director of Planning and to the Commission.

6. Determination Effective—Appeal—The determination of the Administrator shall be final on all matters under his jurisdiction under this Chapter, except that appeals therefrom may be taken to the Board as hereafter provided for in Sec. 12.27. No

variance granted by the Administrator shall become effective until after an elapsed period of ten (10) days from the date the written determination is made, during which time an appeal may be filed with the Board. If, after said ten (10) day period no appeal is filed, such variance shall be authority for the issuance of a permit or license by any department or person vested with the duty or authority to issue same. The violation of any of the conditions imposed by the Administrator or Board in connection with the granting of any variance or action taken pursuant to the authority of this Chapter, shall constitute a violation thereof and shall be subject to the same penalties as any other violation of this Chapter.

7. Condition of Variance—Each determination of the Administrator granting a variance shall, where appropriate, contain as a condition thereof the following: “The variance hereby allowed is conditional upon the privileges being utilized within one hundred-eighty (180) days after the effective date hereof, and if they are not utilized or construction work is not begun within said time, and carried on diligently to completion of at least one usable unit, this authorization shall become void, and any privilege or variance granted hereby shall be deemed to have lapsed.” The Administrator, however, shall have authority to extend the time limit in the case of unavoidable delay. Once any portion of the variance privilege is utilized, the other conditions thereof become immediately operative and must be strictly complied with.

8. Continuance of Variance or Exception—No provision of this Section shall be interpreted or construed as limiting or interfering with the rights established by any variance or exception granted prior to the effective date of this Article, (a) by ordinance pursuant to the provisions of Ordinances Nos. 42,666 (N.S.), 66,750, 74,140 or Chapter 1 of the Los Angeles Municipal Code; (b) by determination of the Administrator or Board pursuant to the provisions of Chapter 1 of said Code; or (c) by determination of the former Board of City Planning Commissioners pursuant to the provisions of Ordinance No. 74,145 or Chapter 1 of said Code. Notwithstanding any of the provisions of such ordinance granting a variance or exception, the Administrator shall henceforth have jurisdiction to perform all administrative acts with which the Board of City Planning Commissioners, City Council or its Planning Committee were formerly charged under such ordinance, such as approving plans, signs, types of use, and the like. The use of any building, structure or land existing, at the time this Article became effective, by virtue of any exception from the provisions of former Ordinance No. 33,761 (N.S.), may be continued, provided no new building or structure is erected; no existing building or structure is enlarged; and no existing use of the land is extended.

9. Discontinuance of Variance or Exception—Revocation—If the use authorized by any exception or variance granted by ordinance, or by determination of the Administrator or Board, is, or has been,

abandoned or discontinued for a period of six (6) months or the conditions of the variance have not been complied with, the Administrator, upon knowledge of such fact, shall give notice to the record [52] owner or lessee of the real property affected thereby to appear at a time and place fixed by the Administrator and show cause why the ordinance, or the determination of the Administrator or the Board, granting the exception or variance should not be repealed or rescinded as the case may be. After such hearing, the Administrator may revoke the variance, or if an ordinance is involved and he so recommends, the Council may repeal the ordinance, and after such revocation or repeal the property affected thereby shall be subject to all the regulations of the zone in which such property is located, as provided in this Article.

10. Failure to Utilize Variance or Exception—
Repeal—If the rights established by any ordinance heretofore adopted authorizing an exception or conditional variance from the provisions of Chapter 1 of the Los Angeles Municipal Code, or Ordinances Nos. 42,666 (N.S.), 66,750 and 74,140, have not been executed or utilized, the record owner of the real property involved in the ordinance shall be notified by the Administrator that the ordinance will be repealed if the privilege granted thereby is not exercised within six (6) months. If, during the six (6) months period following such notification, the record owner has not proven to the satisfaction of the Administrator that the rights granted by such ordinance have been exercised or utilized, or where

some form of construction work is involved or authorized, such construction work, or some unit thereof, has actually commenced, the Council shall be so notified and may repeal the ordinance granting such exception or conditional variance. After such repeal, the property affected thereby shall be subject to all the regulations of the zone in which such property is located, as provided in this Article.

B. Modification of Yard Regulations

1. Lots of Peculiar Shape or Location—Hillside Lots—In the case of lots of peculiar shape or location or on hillside lots, the Administrator may permit a modification in the application of the yard regulations or the location of accessory buildings on such lots, and he may adopt general interpretations or rulings determining the proper application of such regulations to a specific area or a group of lots each affected by a common problem, or to a particular type or shaped lot which exists in a number of locations or he may determine each individual case as it may arise.

2. Fences, Walls in Front Yards—Estates—In those cases where there are large districts in the “R” Zones where the development is of suburban or state character and containing a substantial number of lots having an area of approximately twenty thousand (20,000) square feet or more, the Administrator may modify the application of the yard regulations to permit fences, walls or hedges in the required front yards, similar to those authorized in the “A” or “RA” Zones by Sec. 12.22-C, 20 (h).

C. Interpretation of Provisions

1. Interpretation in Writing—Whenever there is any question regarding the interpretation of the provisions of this Chapter or their application to any specific case or situation, the Administrator shall interpret the intent of this Chapter by writing decision and such interpretation shall be followed in applying said provisions.

D. Approval of Conditions and Methods of Operation

1. Approval in Writing—Where uses are permitted subject to the approval of the Administrator as to conditions and methods of operation, the Administrator, upon written request, shall have authority to determine and prescribe such conditions and methods of operation under which such uses shall be permitted and shall do so in writing. After the receipt of such request, the Administrator shall make his written determination within twenty (20) days and shall forthwith transmit a copy thereof to the applicant.

Sec. 12.27—Board of Zoning Appeals

A. Appeals

1. Right of Appeal—Any order, requirement, decision, determination, interpretation or ruling made by the Administrator in the administration or enforcement of the provisions of this Chapter, may be appealed therefrom to the Board by any person aggrieved, or by an officer, board, department or bureau of the City. The taking of an appeal stays proceedings in the matter appealed from until the determination of the appeal.

2. Notice of Appeal—Form and Contents—The notice of appeal shall be in writing and shall be filed in duplicate, in the office of the Administrator, upon forms provided by the Board. An appeal from any order, requirement, decision, determination or interpretation by the Administrator in the administration or enforcement of the provisions of this Chapter, must set forth specifically wherein there was error or abuse of discretion on his part. An appeal from the rulings, decisions and determinations by the Administrator denying or granting a variance, must set forth the particulars wherein the application for variance did meet or did fail to meet, as the case may be, those qualifications or standards set forth in Sec. 12.26-A, 2, as being prerequisite to the granting of any variance.

3. Time for Filing—Any appeal not filed within ten (10) days after the rendition, in writing, of the decision appealed from, shall be dismissed by the Board.

4. Record on Appeal—Within five (5) days after his receipt of the notice of appeal, the Administrator shall transmit to the Board copies of all papers involved in the proceedings, a copy of his findings and determination relative thereto, and one copy of the notice of appeal. In addition, he may make and transmit to the Board such supplementary report as he may deem necessary to present clearly the facts and circumstances of the case.

5. Hearing Date—Notice—Upon receipt of the record, the Board shall set the matter for hearing and give notice by mail of the date, time and place

thereof to the appellant, to the Administrator, and to any other party at interest who has requested in writing to be so notified, and no other notice thereof need be given, except in those cases hereinafter mentioned.

In cases where the appeal is from a determination granting or denying a variance or a conditional use the Board shall not reverse or modify, in whole or in part, any determination of the Administrator unless notice of the time, place and purpose of the hearing has been given by mailing post card notices at least five (5) days prior to said hearing to the owners of the property within three hundred (300) feet of the exterior boundaries of the property involved. The last known name and address of each owner, as shown upon the records of the City Clerk, shall be used for the aforementioned notice.

6. Hearing Date—Continuance—Upon the date set for the hearing the Board shall hear the appeal unless, for cause, the Board shall on that date continue the matter. No notice of continuance need be given if the order therefor be announced at the time for which the hearing was set.

7. Authority of Board—Upon hearing the appeal, the Board shall consider the record and such additional evidence as may be offered and may affirm, reverse or modify, in whole or in part, the order, requirement, decision, determination, interpretation or ruling appealed from, or make and substitute such other or additional decision or determination as it may find warranted under the provisions of this Chapter. The standards herein

established to govern the discretion of the Administrator shall apply with equal force to actions of the Board.

8. Decision by Resolution—The decision of the Board upon the appeal shall be expressed by resolution in writing concurred in by at least two (2) members of the Board and the Board shall forthwith transmit a copy thereof to the applicant and appellant. If the decision be adverse to that of the Administrator on any action concerning the administration or enforcement of the provisions of this Chapter, the resolution by the Board shall specify wherein there was an error or abuse of discretion on his part. No determination of the Administrator granting or denying a variance, shall be reversed or modified by the Board unless the Board shall include in its decision a finding of fact showing wherein the application did meet or did fail to meet the variance requirements set forth in Sec. 12.26-A, 2, as being prerequisite to the granting of any variance.

B. Procedural Rules

1. The Board may adopt from time to time such rules of procedure, not inconsistent with the provisions of this Article, as it may deem necessary to properly exercise its jurisdiction. All such rules shall be kept posted in the public office of said Board, and a copy thereof shall be furnished to any appellant upon his request.

2. The Board shall elect one of its members as Chairman who shall serve for a one (1) year period ending the last week of July of each year. Meetings

of the Board shall be at the call of the Chairman or at such other times as the Board may determine. All meetings of the Board shall be open to the public, and minutes of its proceedings shall be kept showing the vote of each member upon each matter before it for decision, or his absence or failure to vote.

3. Until other provision is made, the Secretary of the City Planning Commission shall also serve as Secretary to the Board, and the staff of the Department of City Planning, through its Director, shall assist the Board in performing its duties and functions.

4. The Board may, in its discretion, in the interest of the prompt dispatch of its business, require all or any part of the additional evidence which may be offered upon any appeal to be reduced to written form.

Sec. 12.28—Certificate of Occupancy

No vacant land shall be occupied or used, except for agricultural uses, and no building hereafter erected or structurally altered shall be occupied or used until a Certificate of Occupancy shall have been issued by the Superintendent of Building.

A. Certificate of Occupancy for a Building—
Certificate of occupancy of a new building or the enlargement or alteration of an existing building shall be applied for coincident with the application for a building permit, and said certificate shall be issued after the request for same shall have been made in writing to the Superintendent of Building

after the erection or alteration of such building or part thereof shall have been completed in conformity with the provisions of these regulations. Pending the issuance of a regular certificate, a Temporary Certificate of Occupancy may be issued by the Superintendent of Building for a period not exceeding six (6) months, during the completion of alterations or during partial occupancy of a building pending its completion. Such temporary certificate shall not be construed as in any way altering the respective rights, duties or obligations of the owners or of the City relating to the use or occupancy of the premises or any other matter covered by this Article, and such temporary certificate shall not be issued except under such restrictions and provisions as will adequately insure the safety of the occupants.

B. Certificate of Occupancy for Land—Certificate of Occupancy for the use of vacant land or the change in the character of the use of land as herein provided, shall be applied for before any such land shall be occupied or used for any purpose except that of tilling the soil and growing therein of farm, garden or orchard products; and a Certificate of Occupancy shall be issued after the application has been made, provided such use is in conformity with the provisions of these regulations.

C. Certificate of Occupancy — Contents — Filing—Fee—Certificate of Occupancy shall state that the building or proposed use of a building or land complies with all laws and ordinances and with the provisions of these regulations. A record of all cer-

tificates shall be kept on file in the office of the Superintendent of Building, and copies shall be furnished, on request, to any person having a proprietary or tenancy interest in the building or land affected. A fee of two dollars (\$2.00) shall be charged for each original Certificate of Occupancy, and a fee of one dollar (\$1.00) each shall be charged for duplicate copies of the certificate.

No excavation for any building shall be started before application has been made for a Certificate of Occupancy.

Sec. 12.29—Plats

All applications for a Certificate of Occupancy shall be made on a printed form to be furnished by the Superintendent of Building and shall contain accurate information and dimensions as to the size of and location of the lot; the size and location of the buildings or structures on the lot; the dimensions of all yards and open spaces; and such other information as may be necessary to provide for the enforcement of these regulations. Where complete and accurate information is not readily available from existing records, the Superintendent of Building may require the applicant to furnish a survey of the lot prepared by a licensed surveyor. A careful record of the original copy of such applications and plats shall be kept in the office of the Superintendent of Building, and the duplicate copy shall be kept at the building at all times during construction.

Sec. 12.30—Boundaries of Zones

Where uncertainty exists with respect to the boundaries of the various zones, as shown on the zoning map accompanying and made a part of this Article, the following rules shall apply:

A. Streets or Alleys—The zone boundaries are either streets or alleys, unless otherwise shown, and where the indicated boundaries on said zoning map are approximately street or alley lines, said streets or alleys shall be construed to be the boundaries of such zone.

B. Lot Lines—Where the zone boundaries are not shown to be streets or alleys, and where the property has been or may hereafter be divided into blocks and lots, the zone boundaries shall be construed to be lot lines; and where the indicated boundaries on the zoning map are approximately lot lines, said lot lines shall be construed to be the boundaries of such zone, unless said boundaries are otherwise indicated on the map.

C. Scale on Map—Determination by Commission—Where the property is indicated on the zoning map as acreage and not subdivided into lots and blocks, or where the zone boundary line shall be determined by the Commission by written decision, boundary lines on the zoning map shall be determined by the scale contained on such map, and where uncertainty exists, the zone boundary line shall be determined by the Commission by written decision. In the event property shown as acreage on the zoning map has been or is subsequently sub-

divided into lots and blocks by a duly recorded subdivision may and the lot and block arrangement does not conform to that anticipated when the zone boundaries were established, or property is resubdivided by a duly recorded subdivision map, into a different arrangement of lots and blocks than shown on said zoning map, the Commission, after notice to the owners of property affected thereby and hearing, may interpret the zoning map and make minor readjustments in the zone boundaries in such a way as to carry out the intent and purposes of these regulations and conform to the street and lot layout on the ground. Such interpretations or adjustments shall be by written decision, and thereafter the copies of the zoning map in the offices of the Departments of City Planning and Building and Safety shall be changed to conform thereto.

D. Symbol for Zone—Where one symbol is used on the zoning map to indicate the zone classification of an area divided by an alley or alleys, said symbol shall establish the classification of the whole of such area.

E. Street or Right of Way—Allocation or Division—A street, alley, railroad or railway right of way, watercourse, channel or body of water, included on the zoning map shall, unless otherwise indicated, be included within the zone of adjoining property on either side thereof; and where such street, alley, right of way, watercourse, channel or body of water, serves as a boundary between two or more different zones, a line midway in such street, alley, right of way, watercourse, channel or

body of water, and extending in the general direction of the long dimension thereof shall be considered the boundary between zones.

F. Vacated Street or Alley—In the event a dedicated street or alley shown on the zoning map is vacated by ordinance, the property formerly in said street or alley shall be included within the zone of the adjoining property on either side of said vacated street or alley. In the event said street or alley was a zone boundary between two or more different zones, the new zone boundary shall be the former center line of said vacated street or alley.

Sec. 12.31—Interpretation—Purpose—Conflict

In interpreting and applying the provisions of this Chapter, they shall be held to be the minimum requirements for the promotion of the public health, safety, comfort, convenience and general welfare. It is not intended by the Chapter to interfere with or abrogate or annul any easement, covenant or other agreement between parties. Where this Chapter imposes a greater restriction upon the use of buildings or land, or upon the height of buildings, or requires larger open spaces than are imposed or required by other ordinances, rules, regulations, or by easements, covenants or agreements, the provisions of this Chapter shall control. Provided, that such provisions shall not apply to any variance or exception granted prior to the effective date of this Article, (a) by ordinance pursuant to the provisions of Ordinances Nos. 42,666 (N.S.), 66,750, 74,140 or Chapter 1 of the Los Angeles Municipal Code; (b)

by determination of the Administrator or Board pursuant to the provisions of Chapter 1 of said Code; and (c) by determination of the former Board of City Planning Commissioners pursuant to the provisions of Ordinance No. 74,145 or Chapter 1 of said Code. Provided, further, that such provisions shall not be interpreted or construed as interfering with the continuation of those existing specific uses which heretofore were required by ordinance to be located in the following special districts: (a) Cemetery Districts—Ordinance No. 19,534 (N.S.); (b) Undertaking Districts — Ordinance No. 31,746 (N.S.); (c) Public Camp Districts—Ordinance No. 44,434 (N.S.); (d) Mental Sanitarium Districts—Ordinance No. 58,647; and (e) Rabbit and Poultry Slaughter House Districts—Ordinance No. 65,050. In no case, however, shall any of the above uses be extended or expanded on to property not so used at the time this Article became effective.

Sec. 12.32—Changes and Amendments

A. Procedure for Change—Whenever the public necessity, convenience, general welfare or good zoning practice require, the City Council may by ordinance, after report thereon by the Commission and subject to the procedure provided in this section, amend, supplement or change the regulations, zone boundaries, or classifications of property, now or hereafter established by this Article. An amendment, supplement, reclassification or change may be initiated by a resolution of intention by the Commission or the City Council or by a verified appli-

cation of one or more of the owners or lessees of property within the area proposed to be changed.

B. Applications for Change—Form and Contents—Applications for any change of zone boundaries or reclassification of zones, as shown on the zoning map, shall be filed with the Commission in the public office of the Department of City Planning upon forms and accompanied by such data and information as may be prescribed for that purpose by the Commission so as to assure the fullest practicable presentation of facts for the permanent record.

Each such application shall be verified by at least one of the owners or lessees of property within the area proposed to be changed, attesting to the truth and correctness of all facts and information presented with the application.

C. Hearing Date—Notice—Upon the filing of such application or the adoption of such resolution by the Commission or City Council, the matter shall be referred to the Administrator for report and recommendation and shall be set for hearing before the Commission. Notice of the time, place and purpose of such hearing shall be given by the following method:

1. By at least one publication in a newspaper of general circulation in the City, designated for that purpose by the City Council and not less than ten (10) days prior to the date of hearing.

2. By mailing a postal card or letter notice not less than five (5) days prior to the date of such hearing to the owners of all property within three

hundred (300) feet of the area proposed to be changed, using for this purpose the last known name and address of such owners as shown upon the records of the City Clerk. Where all property within the three hundred (300) foot radius is under the same ownership as the property proposed to be changed, the owners of all property adjoining that owned by the applicant shall also be notified in the same manner as herein provided.

3. In connection with a hearing concerning only the amending, supplementing or changing of the text of this Chapter, the published notice of public hearing, as provided in Paragraph 1 of this Subsection, shall suffice.

D. Decision by Commission and City Council—The report and recommendation of the Administrator on each such application or resolution shall be submitted to the Director of Planning and the Commission. If, from the facts presented, the Commission finds that public necessity, convenience, general welfare or good zoning practice require the change or reclassification involved or any portion thereof, the Commission may recommend such change to the City Council and otherwise it shall deny the application. The Commission shall make its findings and determination in writing within thirty (30) days from the date of filing of any application and shall forthwith transmit a copy thereof to the applicant. If the application is approved, the Commission shall forward its findings and recommendations to the City Council. The City Council, after it or its Planning Committee has conducted a public hearing

thereon, with published notice thereof, as provided in Paragraph 1, Subsection C of this Section, may by ordinance effect such amendment, supplement, change or reclassification or any portion thereof.

E. Denial — Appeal — If an application for change or reclassification is denied by the Commission as provided above, the applicant may within twenty (20) days from the date the notification of denial was mailed to said applicant, appeal to the City Council by written notice of appeal filed with the City Clerk. Said appeal shall be filed in duplicate and shall set forth specifically wherein the Commission's findings were in error and wherein the public necessity, convenience, welfare or good zoning practice require such change or reclassification. Said appeal must be referred to the Commission, and thereupon the Commission shall make a report to the City Council disclosing in what respect it failed to find that the public necessity, convenience, general welfare or good zoning practice requires the change or reclassification involved. The City Council may, by a two-thirds ($\frac{2}{3}$) vote of the whole of said Council, grant any such appealed application, but before making any change in the recommendation of the Commission, the Council or its Planning Committee must set the matter for hearing, giving the same notice of hearing as that provided in Paragraphs 1 and 2, Subsection C of this Section and must make a written finding of fact setting forth wherein the Commission's findings were in error. The procedure of the City Council in effecting a change or reclassification of property

initiated by resolution of intention, rather than by application of property owners, or for an amendment or supplement to the text which has been disapproved or partially disapproved by the Commission, shall be the same as that outlined above in this Subsection for the granting of an appealed application, except that the published notice of hearing, as provided above, shall suffice on any matter involving only an amendment or supplement to the text of this Chapter.

F. Changes Incident to Subdivisions—The City Council shall have authority to make changes without holding a public hearing where, in the subdivision of an area, it is found by the Commission that the zones, as shown on the zoning map, do not conform with the best subdivision and use of the land. In such instances, the City Council may, upon the recommendation of the Commission, authorize within the boundaries of the area being subdivided, the appropriate adjustment of zone boundaries or the reclassification of the area into a more restricted zone. Such recommendation of the Commission to the City Council shall be made only after receipt of a written request by the owner of the area being subdivided, but no public hearing or filing fee shall be required by the Commission.

Sec. 12.33—Filing Fees—Service Charges

A. Fee for Application—Before accepting for filing any application hereinafter mentioned, the Department of City Planning shall charge and collect the following filing fees:

1. Change of Zone—Oil Drilling District—For each application for a change of zone boundaries, reclassification of zone, or the establishment or change in the boundary of an oil drilling district, a fee of forty dollars (\$40.00) for the first block or portion thereof, plus five dollars (\$5.00) for each additional block or portion thereof.

2. Variances—Conditional Uses—For each application for a variance from the height or area provisions of this Article, a fee of ten dollars (\$10.00); for each application for a variance from other provisions of this Article or for conditional use, a fee of thirty-five dollars (\$35.00); provided, that such fees shall not apply to applications filed by the Los Angeles City Board of Education, and budgetary departments of the City.

In those cases where more than one (1) record lot is involved, the above fee for a variance or conditional use shall apply to the first lot or portions thereof and there shall be an additional fee of one dollar (\$1.00) for each additional lot or portion thereof. Provided, however, that where the property involved has not been subdivided into lots of less than one (1) acre in area, the additional fee shall be three dollars (\$3.00) for each additional acre or portion thereof.

3. Appeal to Board—For each notice of appeal to the Board from any order, requirement, decision, determination, interpretation or ruling of the Administrator in the administration or enforcement of the provisions of this Chapter, a fee of ten dollars (\$10.00).

The fee for the filing of an application as herein provided and the service charge for a use map and property owners list heretofore specified in Subsection B of this Section, may be paid at the same time, in which case the date of filing such application shall be the date on which the Department of City Planning completes said map and list.

B. Service Charge—Map and List—Upon the request of any person, the Department of City Planning shall prepare or cause to be prepared the Uses Map and Property Owner's List required by the rules and regulations of the Commissioner or Administrator, and shall collect a service charge as follows:

1. Change of Zone—Oil Drilling District—In connection with an application for a change of zone boundaries, reclassification of zone, or the establishment or change in the boundary of an oil drilling district, the sum of fifteen dollars (\$15.00) for the first block or portion thereof plus five dollars (\$5.00) for each additional block or portion thereof.

2. Variances—Conditional Use — In connection with an application for a variance from the provisions of this Article, or for a conditional use, the sum of ten dollars (\$10.00).

In those cases where more than one (1) record lot is involved, the above sum for a variance or conditional use shall apply to the first lot or portion thereof and there shall be an additional fee of one dollar (\$1.00) for each additional lot or portion thereof. Provided, however, that where the property involved has not been subdivided into lots of

less than one (1) acre in area, the additional fee shall be three dollars (\$3.00) for each additional acre or portion thereof.

C Block—For the purpose of this Section a “block” shall mean the “frontage” (as in this Article defined) on both sides of a street. Where said block is more than six hundred-sixty (660) feet in length each such length or portion thereof shall constitute a separate block. In the case of undivided property a block shall be assumed to be the conventional size of 330'x660'.

Sec. 12.34—Permits—Licenses—Compliance

Any license, permit or certificate of occupancy, issued in conflict with the provisions of this Chapter, shall be null and void.

Sec. 12.35—Administration—Enforcement

A. Authority of Commission—The Commission shall have authority to establish from time to time such policies, or methods of operation not in conflict with the provisions of the Charter, as it deems necessary to facilitate and insure the proper administration and enforcement of this Chapter by the Administrator. Whenever the Commission shall establish any such policies, or methods of operation, it shall furnish the Administrator with a copy thereof, and it shall be his duty to comply therewith in the administration and enforcement of the provisions of this Chapter. Further, the Administrator shall make such periodical summary reports as required by the Commission, giving a resume of all

applications received by him, the nature of the cases and his decisions and reasons therefor.

B. Authority of Administrator—The Administrator shall have the control of and be responsible for the administration and enforcement of the regulations and provisions of this Chapter. He shall also have the authority to establish from time to time such rules and regulations as he deems necessary to properly exercise his authority under the provisions of this Chapter. Whenever the Administrator shall establish any such rules and regulations which are of general application or shall make any ruling under or any interpretation of the various provisions of this Chapter, which rulings or interpretations are of general application, he shall thereupon furnish a copy thereof to the City Clerk who shall have the same published once in a daily newspaper of general circulation in the City of Los Angeles designated for that purpose. He shall keep a permanent record of the proceedings had in connection with each application and each matter presented to him for determination.

The Administrator shall from time to time furnish such information to the various departments, officers or employees of the City vested with the duty or authority to issue permits or licenses as will insure the proper administration and enforcement of the provisions of this Chapter and the interpretations and determinations of the Administrator and the Board. To that end, it shall be the duty of said departments, officers or employees to cooperate with the Administrator.

C Inspection of Premises—In the enforcement of this Chapter, the Administrator or his authorized representative shall have the authority to enter any building or upon any premises for the purpose of investigation and inspection; provided, however, that no dwelling shall be so entered without the consent of the occupant unless a twenty-four (24) hour notice of intention to enter shall have been served upon such occupant.

D. Legal Proceedings by City Attorney—The City Attorney upon request of the Administrator or his representative, shall institute any necessary legal proceedings to enforce the provisions of this Chapter, and the City Attorney is hereby authorized, in addition to other remedies, to institute an action for an injunction to restrain, or any other appropriate action or proceedings, to enforce such provisions.

E. Enforcement by Chief of Police—The Chief of Police and his authorized representatives, shall have the power, upon the request of the Administrator or his representatives, to assist in the enforcement of the provisions of this Charter.

Section 2—That Article 3 of Chapter 1 of the Los Angeles Municipal Code (Ordinance No. 77,000, as amended) be, and the same is hereby amended in its entirety so as to read as follows:

Article 3—Oil Drilling Districts

Sec. 13.00—Oil Drilling Districts—Establishment—
Conditions Controlling Drilling and Production

A. Establishment of Districts — Procedure —
Limitations—The procedure for the establishment

of oil drilling districts or the extension of existing districts under Subdivision E of this Section shall be the same as that provided for in Sec 12.32, Article 2, of the Los Angeles Municipal Code (Changes and Amendments).

Each application for the establishment of such district shall include a net area of not less than one (1) acre (excluding public streets, alleys, walks or ways), consisting of one or more contiguous parcels of land which may be separated by a public alley or walk.

In no case shall a district of less than one (1) net acre be established nor shall more than one (1) well be permitted for each acre in a district. Further, no person shall be permitted to conduct any oil drilling and production operations in a district on a drilling site area of less than one (1) net acre, computed in the manner described in this Subsection, except that such site may be less than one (1) net acre in area when surrounded on all sides by streets.

B. Conditions Controlling Oil Drilling and Production—The Administrator shall have the authority and duty to determine and prescribe the conditions under which operations shall be conducted in connection with the drilling for and producing of oil, gas or other hydrocarbons, on a drilling site within the districts hereafter described in Subsection E of this Section.

No operations shall be commenced nor shall any permit be issued therefor until the Administrator makes a written determination prescribing the conditions under which such operations shall be conducted.

Any person desiring to conduct oil drilling and production operations in a district established under this Section, shall file a written application with the Administrator requesting a determination prescribing the conditions under which such operations shall be conducted.

Upon receipt of such application, the Administrator shall investigate the drilling site as well as the surrounding area in order to determine the conditions to be prescribed for the drilling and production operations so as to adequately protect the surrounding property and improvements.

Where the drilling site is so located as to isolate any parcel of land in such manner that it could not be joined with other land so as to create another drilling site of at least one (1) net acre, the Administration shall require, as a condition to the drilling and production on such site, that the owner, lessee or permittee and their successors in interest of such site, shall pay in lawful money of the United States of America to the owners of each such isolated parcel, their successors or assigns, a share of the proceeds of all oil, gas or other hydrocarbon substances produced or saved from the well in that proportion of the amount required to be paid as landowners royalty to the land owners of the property involved in the drilling site that the area of such isolated parcel bears to the total area of all such isolated parcels and the property involved in the drilling site. In no case, however, shall the owner of each isolated parcel or his successors in interest or assigns be paid an amount less than the

proportion of one-sixth ($1/6$) of the total production of the well that the area of the isolated parcel bears to the total area of all isolated parcels and the property involved in the drilling site.

The Administrator shall make his written determination, as herein provided, within twenty (20) days from the date of filing of the application and shall forthwith transmit a copy thereof to the applicant.

C. Determination Effective—Appeal—No determination by the Administrator under this Section shall become effective until after an elapsed period of ten (10) days from the date such written determination is made, during which time an appeal therefrom may be taken to the Board as provided for in Sec. 12.27, Article 2, of the Los Angeles Municipal Code (Board of Zoning Appeals).

D. Violation of Conditions—Penalty—The violation of any determination by the Administrator as provided in this Section, shall constitute a violation of the provisions of this Article and shall be subject to the same penalties as any other violation of the Los Angeles Municipal Code.

E. Description of Districts—The districts referred to in Subsection B of this Section, within which the Administrator shall determine and prescribe conditions under which oil drilling and production operations shall be conducted, are described as follows:

1 That portion of the Shoestring Addition, annexed December 26, 1906, between Athens Boulevard and Redondo Beach Boulevard.

2. That portion of the Palms Addition, annexed May 22, 1915, bounded on the north by Higuera Street and its easterly prolongation along Jefferson Boulevard; on the east by Moynier Lane; and on the south, southwest, northwest, and west by the boundary line of the City of Los Angeles established by Ordinance No. 32,191 (N.S.), said boundary line being also the common boundary line between the City of Los Angeles and Culver City.

3. That portion of the San Fernando Addition, annexed May 22, 1915, comprising Lots 6, 7 and 8, Tract No. 10422 as per map recorded in Book 157, Pages 38 to 44 both inclusive, of Maps, Records of Los Angeles County, located westerly of San Fernando Road and Balboa Boulevard, and adjacent to the northerly boundary line of the City of Los Angeles established by Ordinance No. 32.192 (N.S.).

4. That portion of the Wilmington Consolidation, annexed August 28, 1909, bounded on the east by Frigate Avenue; on the south by "L" Street; on the west by Figueroa Street; and on the north by "Q" Street.

5. That portion of the Wilmington Consolidation, annexed August 28, 1909, bounded as follows: beginning at the intersection of Avalon Boulevard and Pacific Coast Highway; thence southerly along Avalon Boulevard to Anaheim Street; thence westerly along Anaheim Street to Neptune Avenue; thence northerly along Neptune Avenue to Opp Street; thence westerly along Opp Street to McDonald Avenue; thence northerly along McDonald Avenue to Pacific Coast Highway; thence along Pacific Coast Highway to Avalon Boulevard.

6. That portion of the Wilmington Consolidation, annexed August 28, 1909, bounded as follows: beginning at the intersection of Anaheim Street and the East Boundary Line of the City of Los Angeles; thence westerly along Anaheim Street to Avalon Boulevard; thence northerly along Avalon Boulevard to Pacific Coast Highway; thence easterly along Pacific Coast Highway to Broad Avenue; thence southerly along Broad Avenue to a line parallel with and distant 125 feet northerly of the northerly line of "L" Street; thence easterly along said parallel line to a line parallel with the distant 300 feet easterly of the easterly line of Hyatt Avenue; thence northerly along said parallel line and its northerly prolongation to the westerly prolongation of "P" Street; thence easterly along said prolongation and along "P" Street to Blinn Avenue; thence southerly along Blinn Avenue to Robidoux Street; thence easterly along Rodiboux Street and its easterly prolongation to Alameda Street; thence southwesterly along Alameda Street to Young Street; thence easterly along Young Street to its easterly terminus and continuing southeasterly along the Southern Pacific Railroad Company Right of Way to the northerly roadway of "I" Street; thence easterly along said "I" Street to the East Boundary Line of the City of Los Angeles; thence southeasterly along said Boundary to Anaheim Street.

7. That portion of the Wilmington Consolidation, annexed August 28, 1909, bounded as follows: beginning at the intersection of Avalon Boulevard

and "B" Street; thence northerly along Avalon Boulevard to Anaheim Street; thence easterly along Anaheim Street to Alameda Street; thence southwesterly along the Southern Pacific Railroad Company Right of Way to "B" Street; thence westerly along "B" Street to Avalon Boulevard.

8. That portion of the San Fernando Addition Annexed May 22, 1915, consisting of Block 180 of the Maclay Rancho, Ex Mission de San Fernando, as per map recorded in Book 37, Pages 5 to 16, inclusive, Miscellaneous Records of Los Angeles County, located northeasterly of Bradley Street between Needham and Gilford Avenues.

9. That portion of the San Fernando Addition annexed May 22, 1915, consisting of the southwesterly $\frac{1}{4}$ of the southwesterly $\frac{1}{4}$ of Section 6, Township 2 North, Range 15 West, S. B. B. & M., Records of Los Angeles County, State of California, lying easterly and adjacent to the easterly line of Balboa Avenue (60 feet in width) and lying northerly and adjacent to the northerly line of Rinaldi Street (60 feet in width).

Excepting therefrom so much of said property that may be included within the lines of any public street.

10. That portion of the San Fernando Addition annexed May 22, 1915, consisting of Lots 29, 30, 31 and 32, Tract No. 2500, as per map recorded in Book 28, Pages 9 and 10 of Maps, Records of Los Angeles County, State of California.

11. That portion of the Wilmington Consolidation annexed August 28, 1909, bounded on the

north by Pacific Coast Highway (formerly known as "O" Street); on the east by McDonald Avenue; on the south by "L" Street; and on the west by Frigate Avenue.

12. That portion of the San Fernando Addition annexed May 22, 1915, comprising a part of Section 23, Township 2 North, Range 17 West, S. B. & M., Rancho Ex Mission de San Fernando and that portion of Lot 24, B. F. Porter Tract as shown on map recorded in Book 78, Page 37 of Miscellaneous Records of Los Angeles County, State of California, more particularly described as follows:

Beginning at the intersection of the northwest corner of said Lot 24 with the southerly line of Plummer Street (60 feet in width); thence east along said southerly line of Plummer Street 300 feet; thence south 300 feet to the true point of beginning; thence east 420 feet; thence south 1800 feet; thence west 1124.572 feet; thence north 1400 feet; thence east 704.572 feet; thence north 400 feet to the true point of beginning.

13. That portion of the Wilmington Consolidation, annexed August 28, 1909, bounded on the south by Pacific Coast Highway (formerly known as "O" Street); on the west by Ronan Avenue; on the north by "Q" Street; and on the east by Bay View Avenue; subject to the condition hereafter set forth in Paragraph 23, Subsection F of this section.

14. That portion of the San Fernando Addition annexed May 22, 1915, comprising a part of Sections 19 and 30, T. 3 N., R. 15 W., S. B. B. & M., in the County of Los Angeles, described as follows:

Beginning at the most northerly corner of Block 181, Maclay Rancho, Ex Mission de San Fernando as per map recorded in Book 37, Pages 5 to 16, both inclusive, Miscellaneous Records of said County; thence in a northwesterly direction along the northeasterly line of said Maclay Rancho, a distance of 1060 feet to a point in the northeasterly line of Block 180 said Maclay Rancho; thence south $60^{\circ} 04' 00''$ West to a point in the easterly line of Needham Street, 60 feet in width, which is the true point of beginning for this description; thence continuing south $60^{\circ} 04' 00''$ west, to a point in the northeasterly line of the Southern Pacific Railroad Right-of-Way, 100 feet in width, lying northeasterly of San Fernando Road; thence southeasterly along said Right-of-Way through all its various curves and courses to its point of intersection with the easterly line of Needham Street, 60 feet in width; thence northerly along the easterly line of Needham Street to the true point of beginning.

15. That portion of the Wilmington Consolidation, annexed August 28, 1909, bounded on the north by Sandison Street; on the east [53] by Ronan Avenue; on the south by Pacific Coast Highway; and on the west by Gulf Avenue; subject to the conditions hereafter set forth in Paragraphs 1, 2 and 23, Subsection F of this Section.

16. That portion of the Wilmington Consolidation, annexed August 28, 1909, bounded on the north by "Q" Street; on the east by Wilmington Boulevard; on the south by Pacific Coast Highway; and on the west by Frigate Avenue; subject to the

conditions hereafter set forth in Paragraphs 1, 2 and 23, Subsection F of this Section.

17. That portion of the City of Los Angeles incorporated April 4, 1850, described as follows: Lot A, Tract No. 4957 as per map recorded in Book 122, Page 67, of Maps, Records of Los Angeles County; Lots 1, 2, 7, 8, 9, 10, 11 and 12 Block K and Lots 1 to 6, both inclusive, Block L, North Elysian Heights No. 2 as per map recorded in Book 11, Page 144, of Maps, Records of said County; also, that portion of Lot 2, Block 43, 35 Acre Tracts of the Los Angeles City Lands Hancock's Survey as per map recorded in Book 107, pages 320 and 321, Miscellaneous Records of said County in Elysian Park and that portion of Lot A, J. D. and Asa Hunter Property as per map recorded in Book 13, pages 34 and 35, of Maps, Records of said County in Elysian Park, lying southwesterly of Riverside Drive and northwesterly of the following described line: Beginning at the point of intersection of the southwesterly prolongation of the southeasterly line of Dallas Street, fifty (50) feet in width; with the southwesterly line of Riverside Drive, one hundred (100) feet in width; thence southwesterly in a direct line to the most southerly corner of Lot 13, Tract No. 5114 as per map recorded in Book 94, page 4, of Maps, Records of said County; subject to the condition that production of oil in said district shall be permitted only for the duration of the war or for a period not to exceed seven (7) years from and after January 1, 1944, and subject also

to the conditions hereafter set forth in Paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16 and 17, Subsection F of this Section.

18. That portion of the San Fernando Addition, annexed May 22, 1915, being all of that portion of Lot 25 of the B. F. Porter Tract as recorded in Book 78, page 37 of Miscellaneous Records in the office of the Recorder of Los Angeles County, California, and that portion of Lot "B" of Tract No. 2843 recorded in Book 34, pages 82 and 83 of Maps in the office of the Recorder of said County, bounded and described as follows: Beginning at the Easterly terminus of that certain line described in deed to the Board of Public Service Commissioners of The City of Los Angeles, recorded in Book 43, page 16 of Official Records in the office of the Recorder of said County, as having a bearing East and a distance of 1520 feet; thence North 1550 feet; thence East 500 feet; thence Northeasterly a distance of 2112 feet along that certain line described in said deed to the Board of Public Service Commissioners as running Northeasterly in a straight line to a point, being the intersection of the Southerly prolongation of the West line of Lot 64, Block 24 of Chatsworth Park, as per map recorded in Book 30, page 31 of Miscellaneous Records in the office of the Recorder of said County, with the North line of said Lot 25; thence Northwesterly at right angles a distance of 400 feet; thence Southwesterly a distance of 1906 feet along a line 400 feet Northwesterly of and parallel with that above mentioned line running Northeasterly and having a distance of 2112 feet; thence West 694 feet along a line 400 feet North of

and parallel with that above mentioned line having bearing of East and a distance of 500 feet; thence South, 1950 feet along a line, 400 feet West of and parallel with the above mentioned line having a bearing of North and a distance of 1550 feet; thence due East a distance of 400 feet to the point of beginning.

19. That portion of the Wilmington Consolidated, annexed August 28, 1909, bounded on the south by Pacific Coast Highway (formerly known as "O" Street); on the West by Wilmington Boulevard; on the north by Sandison Street; and on the east by Gulf Avenue; subject to the conditions hereafter set forth in Paragraphs 1, 2 and 23, Subsection F of this Section.

20. That portion of the Wilmington Consolidation, annexed August 28, 1909, bounded on the east by a line parallel with and distant three hundred (300) feet easterly, measured at right angles from the easterly line of Hyatt Avenue; on the south by a line parallel with and distant one hundred and twenty-five (125) feet northerly measured at right angles from the northerly line of "L" Street; on the west by the easterly line of the Prosperity Tract as per map recorded in Book 16, pages 14 and 15 of Maps, Records of Los Angeles County; and on the north by Pacific Coast Highway; subject to the conditions hereafter set forth in Paragraphs 1, 2, 3, 4 and 5, Subsection F of this Section.

21. That portion of the San Fernando Addition annexed May 22, 1915, consisting of the northerly $\frac{1}{2}$ of the southwesterly $\frac{1}{4}$, the southwesterly $\frac{1}{4}$ of

the northwesterly $\frac{1}{4}$, and the northerly $\frac{1}{2}$ of the southeasterly $\frac{1}{4}$ of the northwesterly $\frac{1}{4}$ of Section 30, Township 2 North, Range 16 West, S. B. B. & M.; also that portion of Lot 25, B. F. Porter Tract, as per map recorded in Book 78, Page 37 of Miscellaneous Records of Los Angeles County, described as follows: Beginning at a point on the easterly line of said Lot 25, distant thereon 1331.81 feet southerly from the northeasterly corner of said Lot 25; thence North $89^{\circ} 55'$ West, a distance of 970.23 feet to a point; thence South $35^{\circ} 41' 30''$ West a distance of 1060.03 feet to the beginning of a tangent curve concave to the northeast and having a radius of 100.02 feet; thence southeasterly along said curve, a distance of 181.56 feet to a point; thence South $68^{\circ} 18' 51''$ East a distance of 236.44 feet to a point; thence South $3^{\circ} 04' 12''$ West a distance of 923.15 feet to a point; thence southerly along a line parallel with the northerly prolongation of the easterly line of Shoup Avenue lying southerly of Roscoe Boulevard to its intersection with a line projecting due west from the Southwest corner of the North $\frac{1}{2}$ of the Southwest $\frac{1}{4}$ of said Section 30; thence easterly along said projected line to the westerly line of said Southwest $\frac{1}{4}$, Section 30, thence northerly along the westerly line of said Section 30 to the point of beginning.

22. That portion of the City of Los Angeles, incorporated April 4, 1850, bounded on the north by Lilac Terrace; on the east by the southeasterly line of Lot 8, Subdivision of the Abila Tract and adjoin-

ing Lands as per map recorded in Book 3, page 476 of Miscellaneous Records of Los Angeles County and the northeasterly prolongation of said line to its intersection with Lilac Terrace; on the south by Figueroa Terrace, the southwesterly line of Lot 1, Victor Heights Tract as per map recorded in Book 12, page 40 of Miscellaneous Records of said County, the westerly line of Lots 7 and 8, Subdivision of the Abila Tract hereinbefore mentioned, extending from the northerly line of College Street to the southeasterly corner of Lot 1, Victor Heights Tract, hereinbefore mentioned, and the northerly line of College Street; on the west by Marview Avenue, the northwesterly line of Lot 2, Subdivision of the Abila Tract hereinbefore mentioned and White Knoll Drive extending from the northwesterly line of said Lot 2 to Marview Avenue; subject to the condition that production of oil in this district shall be permitted only for the duration of the war or for a period not to exceed seven (7) years from and after November 24, 1944, and subject also to the conditions hereafter set forth in Paragraphs 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16 and 17, Subsection F of this Section.

23. That portion of the Wilmington Consolidation annexed August 28, 1909, bounded on the north by "L" Street; on the east by Gulf Avenue; on the south by Denni Street; and on the west by Wilmington Boulevard; subject to the conditions hereafter set forth in Paragraphs 5, 7, 8, 9, 17, 18, 19, 20, 21, 22, 24 and 26, Subsection F of this Section.

24. That portion of the Wilmington Consolidation, annexed August 28, 1909, bounded on the north by "Q" Street; on the east by Ronan Avenue; on the south by Sandison Street; and on the west by Wilmington Boulevard; subject to the conditions hereafter set forth in Paragraphs 5, 7, 8, 9, 17, 18, 19, 20, 21, 22, 23 and 26, Subsection F of this Section.

25. That portion of the Wilmington Consolidation, annexed August 28, 1909, lying within the following described boundary:

Beginning at the point of intersection of the southerly line of Lomita Boulevard with the easterly line of Frigate Avenue; thence easterly along the southerly line of Lomita Boulevard to the westerly line of Island Avenue; thence southerly along the westerly line of Island Avenue to the northerly line of Pacific Coast Highway; thence westerly along the northerly line of Pacific Coast Highway to the westerly line of Bay View Avenue; thence northerly along the westerly line of Bay View Avenue to the southerly line of "Q" Street; thence westerly along the Southerly line of "Q" Street to the westerly line of Wilmington Boulevard; thence southerly along the westerly line of Wilmington Boulevard to the southerly line of "Q" Street; thence westerly along the southerly line of "Q" Street to the easterly line of Frigate Avenue; thence northerly along the easterly line of Frigate Avenue to the southerly line of Lomita Boulevard which is the point of beginning; subject to the conditions hereafter set forth in Paragraphs 5, 7, 8, 9, 17, 18, 19, 20, 21, 22, 23 and 26, Subsection F of this Section.

26. That portion of the Wilmington Consolidation, annexed August 28, 1909, bounded on the north by "M" Street, on the west by Eubank Avenue, on the south by "L" Street and on the east by the Easterly line of Block D, Prosperity Tract as per map recorded in Book 16, pages 14 and 15 of Maps, Records of Los Angeles County; subject to the conditions hereafter set forth in Paragraphs 5, 7, 8, 9, 17, 18, 19, 20, 21, 22, 25 and 26, Subsection F of this Section.

27. That portion of the Wilmington Consolidation, annexed August 28, 1909, bounded on the east by Fries Avenue; on the south by Pacific Coast Highway; on the west by Island Avenue; and on the north by a line described as follows: beginning at a point in the westerly line of Lot V, 111 Acre Range, New San Pedro Commonly Known as Wilmington as per map recorded in Book 6, pages 66 and 67, of Deeds, Records of Los Angeles County, distant thereon 2608.87 feet southerly from the northwesterly corner of said Lot V; thence easterly at right angles to said westerly line of Lot V, to a point in the westerly line of Fries Avenue; subject to the conditions hereafter set forth in Paragraphs 5, 7, 8, 9, 17, 18, 19, 20, 21, 22, 23, 26 and 27, Subsection F of this Section.

28. That portion of the Wilmington Consolidation, annexed August 28, 1909 bounded on the north by "L" Street; on the east by McDonald Avenue; on the south by Denni Street; and on the west by Ronan Avenue; subject to the conditions hereafter set forth in Paragraphs 5, 7, 8, 9, 17, 18, 19, 20, 21, 22, 23, 26 and 28, Subsection F of this Section.

29. That portion of the Wilmington Consolidation, annexed August 28, 1909, bounded on the north by "Q" Street; on the east by Marine Avenue; on the south by Pacific Coast Highway; and on the west by Fries Avenue; also, that portion of Lot V, 111 Acre Range, New San Pedro Commonly Known as Wilmington as per map recorded in Book 6, pages 66 and 67, of Deeds, Records of Los Angeles County, bounded as follows: beginning at a point in the westerly line of said Lot V, distant thereon 2314.16 feet southerly from the northwesterly corner of said Lot V, thence easterly at right angles to said westerly line of Lot V, a distance of 268.87 feet to a point in the westerly line of Fries Avenue, 45 feet in width, thence southerly along the westerly line of Fries Avenue a distance of 294.71 feet to a point, thence westerly at right angles to said westerly line of Fries Avenue, a distance of 368.87 feet to a point in the westerly line of said Lot V, being also a point in the easterly line of Island Avenue, 20 feet in width, thence northerly along the westerly line of said Lot V a distance of 294.71 feet to the point of beginning; subject to the conditions hereafter set forth in Paragraphs 5, 7, 8, 9, 17, 18, 19, 20, 21, 22, 26, 29 and 30, Subsection F of this Section.

F. Conditions Applicable to Districts—In certain of the districts described in Subsection E of this Section, the drilling for and production of oil, gas or other hydrocarbon substances is subject to one or more of the conditions hereinafter specified, but only those conditions referred to in the particu-

lar district shall be applicable thereto. Provided, further, that any written determination hereafter made by the Administrator prescribing conditions controlling oil drilling and production in such district, as provided in Subsection B of this Section, shall also include those conditions specifically mentioned in Subsection E of this Section as being applicable to the particular district.

1. That all pumping units established in said district shall be installed in pits so that no part thereof will be above the surface of the ground.

2. That all oil produced in said district shall be carried away by pipe lines or, if stored in said district, shall be stored in underground tanks so constructed that no portion thereof will be above the surface of the ground.

3. That the operator of any well or wells in the said district shall post with the Administrator a \$5,000 corporate surety bond conditioned upon the faithful performance of all provisions of this Article and any conditions prescribed by the Administrator hereunder. No extension of time that may be granted by the Administrator, or change of specifications or requirements that may be approved or required by him or by any other officer or department of the City, or other alteration, modification or waiver affecting any of the obligations of the grantee made by any City authority, shall be deemed to exonerate either the grantee or the surety on any bond posted as herein required.

4. That the operators shall remove the derrick from each well within thirty (30) days after the

drilling of said well has been completed, and thereafter, when necessary, such completed wells shall be serviced by portable derricks.

5. That the drilling site shall be fenced or landscaped as prescribed by the Administrator.

6. That the derrick and other equipment shall be so constructed and sound-proofed that no noise, vibration, dust, odor or other harmful or annoying substances or effect which can be eliminated or diminished by the use of greater care, shall ever be permitted to result from drilling or production operations carried on at any drilling site, or from anything incident thereto, to the injury or annoyance of persons living in the vicinity; nor shall the site or structures thereon be permitted to become dilapidated, unsightly or unsafe. Proven technological improvements in drilling and production methods shall be adopted as they, from time to time, become available, if capable of reducing factors of nuisance or annoyance.

7. That, except in case of emergency, no materials, equipment, tools or pipe used for either drilling or production operations shall be delivered to or removed from the drilling site, except between the hours of 8:00 a.m. and 8:00 p.m. of any day.

8. That adequate fire fighting apparatus and supplies, approved by the Fire Department, shall be maintained on the drilling site at all times during drilling and production operations.

9. That no refining process or any process for the extraction of products from natural gas shall be carried on at a drilling site.

10. That subject to the approval of the Board of Fire Commissioners, the operator shall counter-sink all equipment used in connection with the flowing or pumping of wells.

11. That no oil shall be removed from wells except by means of underground pipe lines.

12. That no storage facilities shall be erected on the drilling site.

13. That no more than one well shall be bottomed in each five (5) acres of the drilling district.

14. That no new oil wells shall be spudded in after the President of the United States, or other proper authority, has declared that a state of war no longer exists.

15. That subject to the approval of the Board of Fire Commissioners, the operator shall either counter-sink or properly screen from view all equipment used in connection with the flowing or pumping of wells.

16. That drilling, pumping and other power operations in said district shall be at all times carried on only by means of electrical power, which power shall not be generated on the drilling site.

17. That any person requesting a determination by the Administrator prescribing the conditions under which oil drilling and production operations shall be conducted as provided in Subsection B of this Section, shall agree in writing on behalf of himself and his successors or assigns, to be bound by all of the terms and conditions of this Article and any conditions prescribed by written determination by the Administrator hereunder; provided,

however, that such agreement in writing shall not be construed to prevent applicant or his successors or assigns from applying at any time for amendments to this Article or to the conditions prescribed by the Administrator hereunder, or from applying for the creation of a new district or an extension of time for drilling or production operations.

18. That all production equipment used shall be so constructed and operated that no noise, vibration, dust, odor or other harmful or annoying substances or effect which can be eliminated or diminished by the use of greater care shall ever be permitted to result from production operations carried on at any drilling site or from anything incident thereto to the injury or annoyance of persons living in the vicinity; nor shall the site or structures thereon be permitted to become dilapidated, unsightly or unsafe. Proven technological improvements in methods of production shall be adopted as they, from time to time, become available if capable of reducing factors of nuisance or annoyance.

19. Wells which are placed upon the pump shall be pumped by electricity with the most modern and latest type of pumping units of a height of not more than sixteen (16) feet. All permanent equipment shall be painted and kept in neat condition. All producing operations shall be as free from noise as possible with modern oil operations.

20. All drilling equipment shall be removed from the premises immediately after drilling is completed, sump holes filled, and derricks removed within sixty (60) days after the completion of the well.

21. That, subject to the approval of the Board of Fire Commissioners, the operators shall properly screen from view all equipment used in connection with the flowing or pumping of wells.

22. Upon the completion of the drilling of a well the premises shall be placed in a clean condition and shall be landscaped with planting of shrubbery so as to screen from public view as far as possible, the tanks and other permanent equipment, such landscaping and shrubbery to be kept in good condition.

23. That no more than one well shall be drilled in each city block of the drilling district.

24. That no more than one (1) well shall be drilled in each city block of the drilling district, provided, however, that a second well may be drilled in that block bounded by "L" Street, Gulf Avenue, Denni Street, and Wilmington Boulevard, only in the event said second well be directionally drilled or whipstocked so that the bottom of the hole will be bottomed under the Gulf Avenue School property located in the block bounded by "L" Street, Ronan Avenue, Denni Street, and Gulf Avenue, and in lieu of a well which might otherwise be permitted to be drilled in said last mentioned block.

25. That not more than two (2) wells shall be drilled in each city block of the drilling district.

26. That all power operations other than drilling in said district shall at all times be carried on only by means of electrical power, which power shall not be generated on the drilling site.

27. That the owner of the property involved dedicate to the City for street purposes the westerly thirty-five (35) feet of said property.

28. That the well be drilled as far from Ronan Avenue as will be consistent with the fire regulations in respect to McDonald Avenue.

29. That no more than one (1) well shall be drilled to each block of the drilling district, it being the intent that the area bounded by Fries Avenue, Pacific Coast Highway, Island Avenue and the direct east and west extension of Sandison Street shall be considered a city block and that irrespective of any inference drawn from the conditions set forth in District No. 27 as described in Subsection E of this Section, only one well shall be permitted in the above described area.

30. That the owner of the property involved and located westerly of Fries Avenue dedicate to the City for Street purposes the westerly thirty-five (35) feet of said property.

Sec. 13.01—Oil Drilling Districts in Urbanized Areas—Establishment—Conditions Controlling Drilling and Production

A. Purposes and Objects—It is hereby declared to be the object and purpose of this section to establish reasonable and uniform limitations, safeguards and controls for the future drilling for and production of oil in urbanized areas, as the term is defined in this Section. More restrictive limitations, safeguards and controls than those which have heretofore been imposed in metropolitan or urbanized

areas are deemed necessary in the public interest to effect practices which will not only provide for a more economic recovery of oil, gas and other hydrocarbon substances, but which will also take into consideration the surface uses of land, as such uses are indicated by the value and character of the existing improvements in or near districts where oil drilling or production are hereinafter permitted, the desirability of the area for residential or other uses, or any other factor relating to the public health, comfort, safety and general welfare. It is contemplated that extensive urbanized areas may be explored for oil by directional drilling methods by which surface drilling and production operations are limited to a few small, controlled drilling sites so located and spaced as to cause the least detriment to the community and to the public health, safety, comfort and general welfare.

B. Definitions—"Urbanized Areas," as used in this Section, shall refer to any improved or vacant property in any zone (except "A1," "A2" or "M3," as defined in Article 2, Chapter 1 of the Los Angeles Municipal Code, which is developed in such a manner as to be detrimentally affected by the drilling for or production of, oil, gas or other hydrocarbon substances having due regard for the amount of land subdivided, physical improvements, density of population and zoning.

"Controlled Drilling Site," as used in this Section, shall mean that particular location upon which surface operations, incident to oil well drilling or deepening and the production of oil or gas or other

hydrocarbon substances, may be permitted under the terms of this Section, subject to conditions prescribed by written determination by the Administrator. A controlled drilling site must lie entirely within one or more districts described in Subsection L of this Section.

C. Application of Section to Urbanized Areas—The provisions of this Section shall apply to the creation of all oil drilling districts in urbanized areas unless the Council shall determine that, by reason of special circumstances affecting a particular urbanized area, this Section shall not apply.

D. Establishment of Districts — Procedure — Limitations—The procedure for the establishment of oil drilling districts or the extension of existing districts under Subsection L of this Section shall be the same as that provided for in Sec. 12.32, Article 2, of the Los Angeles Municipal Code (Changes and Amendments). In addition to the procedure set forth in said Sec. 12.32, the Commission shall determine whether or not the district involved is in an urbanized area as herein defined. Such determination shall be in the form of a written resolution by the Commission setting forth therein its findings based on an investigation of the amount of land subdivided, physical improvements, density of population and zoning of the proposed oil drilling district and all such property adjacent thereto as would be materially affected by the creation of the district within such area.

Where uncertainty exists as to whether a particular area shall be considered urbanized, any per-

son contemplating filing a petition for the establishment of an oil drilling district, may, prior to the filing thereof, request the Commission to determine the status of the area in which the proposed district is to be located. The Commission shall thereafter, by written resolution, determine the status of said area based upon the same considerations heretofore mentioned in the Subsection, and in said resolution shall state the facts upon which such determination is based.

Each application for the establishment of an oil drilling district under the provisions of this Section shall contain a statement that the applicant has the proprietary or contractual authority to drill for and produce oil, gas or other hydrocarbon substances under the surface of at least fifty-one (51) per cent of the property to be included in said district. The district described in said application shall be not less than forty (40) acres in area, including all streets, ways and alleys within the boundaries thereof, and shall be substantially compact in area, and the boundaries thereof shall follow public streets, ways or alleys so far as may be practicable.

E. Standard Conditions for Districts—All oil drilling districts established under the provisions of this Section shall be subject to the following conditions:

1. Each district shall be not less than forty (40) acres in area, including all streets, ways and alleys within the boundaries thereof.

2. Not more than one controlled drilling site shall be permitted for each forty (40) acres in any

district and such site shall not be larger than two (2) acres when used to develop a district approximating the minimum size; provided, however, that where such site is to be used for the development of larger oil drilling districts or where the Administrator requires that more than one (1) oil drilling district be developed from one (1) controlled drilling site, such site may, at the discretion of the Administrator, when concurred in by the Board of Fire Commissioners, be increased by not more than two (2) acres for each forty (40) acres included in said district or districts.

3. The number of wells which may be drilled from any controlled drilling site shall not exceed one (1) well to each five (5) acres in the district or districts to be explored from said site.

4. Each applicant, requesting a determination by the Administrator prescribing the conditions controlling drilling and production operations, as provided in Subsection F of this Section, must have the proprietary or contractual authority to drill for oil under the surface of at least fifty-one (51) per cent of the property in the district to be exploited.

5. Each applicant, or his successor in interest, shall, within one (1) year from the date the written determination is made by the Administrator prescribing the conditions controlling drilling and production operations as provided in Subsection F of this Section, execute an offer in writing giving to each record owner of property located in said oil drilling district who has not joined in the lease or other authorization to drill, the right to share in

the proceeds of production from wells bottomed in said district upon the same basis as those property owners who have, by lease or other legal consent, agreed to the drilling for and production of oil, gas or other hydrocarbon substances from the subsurface of fifty-one (51) per cent of the said district. The offer hereby required must remain open for acceptance for a period of five (5) years after the date the said written determination is made by the Administrator. During the period said offer is in effect, said applicant, or his successor in interest, shall impound all royalties to which said owners, or any of them, may become entitled, in a bank or trust company in the State of California, with proper provisions for payment to the said record owners of property in the district who had not signed the lease at the time such written determination is made by the Administrator, but who accept such offer in writing within the said five (5) year period. Any such royalties remaining in any bank or trust company at the time said offer expires, which are not due or payable as hereinabove provided, shall be paid pro rata to those owners who, at the time of such expiration, are otherwise entitled to share in the proceeds of such production.

6. That the controlled drilling site or any part thereof shall be adequately landscaped, except for those portions occupied by any required structure, appurtenance or driveway, and all such landscaping shall be maintained in good condition at all times. Plans showing the type and extent of such landscaping shall first be submitted to and approved by the Administrator.

7. Each applicant, requesting a determination by the Administrator, prescribing the conditions controlling drilling and production operations as provided in Subsection F of this Section, shall post with the Administrator a satisfactory corporate surety bond (to be approved by the City Attorney and duplicates shall be furnished to him) in the sum of five thousand dollars (\$5000) in favor of the City of Los Angeles, conditioned upon the performance by the applicant of each and all of the conditions, provisions, restrictions and requirements of this Section, and all additional conditions, restrictions or requirements determined and prescribed by the Administrator. No extension of time that may be granted by the Administrator, or any change of specifications or requirements that may be approved or required by him or by any other office or department of this City or any other alterations, modifications or waiver affecting any of the obligations of the grantee made by any city authority or by any other power or authority whatsoever shall be deemed to exonerate either the grantee or the surety on any bond posted pursuant to this Section.

F. Conditions Controlling Oil Drilling and Production—The Administrator shall have the authority and duty to determine and prescribe the conditions under which operations shall be conducted in connection with the drilling for and producing of oil, gas or other hydrocarbons, on a controlled drilling site within the districts hereafter described in Subsection L of this Section.

No operations shall be commenced nor shall any permit be issued therefor until the Administrator makes a written determination prescribing the conditions under which such operations shall be conducted.

Upon receipt of such application, the Administrator shall investigate the drilling site as well as the surrounding area in order to determine the conditions to be prescribed for the drilling and production operations so as to adequately protect the surrounding property and improvements.

The Administrator shall make his written determination, as herein provided, within twenty (20) days from the date of filing of the application and shall forthwith transmit a copy thereof to the applicant.

G. **Mandatory Conditions**—In the written determination prescribing the conditions as provided in Subsection F of this Section, the Administrator shall also include all conditions and limitations designated in or required by the ordinance enacted by the City Council establishing a district under this Section, and in addition thereto, the Administrator may include any other condition or limitations not in conflict therewith which he may deem appropriate in order to give proper effect to the stated purposes of this Section and other provisions of this Chapter relating to zoning.

H. **Optional Conditions**—For the guidance and convenience of the Council, the Commission, and the Administrator, certain optional conditions most likely to be required, are enumerated:

1. That drilling operations shall be commenced within ninety (90) days from the date the written determination is made by the Administrator as provided in Subsection F of this Section, or within such additional period as the Administrator may, for good cause, allow and thereafter shall be prosecuted diligently to completion or else abandoned strictly as required by laws and the premises restored to their original condition as nearly as practicable so to do. If a producing well is not secured within eight (8) months, said well shall be abandoned and the premises restored to its original condition, as nearly as practicable so to do. The Administrator shall, for good cause, allow additional time for the completion of the well.

2. That drilling, pumping and other power operations shall at all times be carried on only by electrical power and that such power shall not be generated on the controlled drilling site or in the district.

3. That an internal combustion engine or steam-driven equipment may be used in the drilling or pumping operations of the well, and, if an internal combustion engine or steam-driven equipment is used, that mufflers be installed on the mud pumps and engine; and that the exhaust from the steam-driven machinery be expelled into one of the production tanks, if such tanks are permitted, so as to reduce noise to a minimum, all of said installations to be done in a manner satisfactory to the Fire Department.

4. That drilling operations shall be carried on or conducted in connection with only one well at a time in any one such district, and such well shall be brought in or abandoned before operations for the drilling of another well are commenced; provided, however, that the Administrator may permit the drilling of more than one well at a time after the discovery well has been brought in.

5. That all oil drilling and production operations shall be conducted in such a manner as to eliminate, as far as practicable, dust, noise, vibration or noxious odors, and shall be in accordance with the best accepted practices incident to drilling for and production of oil, gas and other hydrocarbon substances. Proven technological improvements in drilling and production methods shall be adopted as they may become, from time to time, available, if capable of reducing factors of nuisance and annoyance.

6. That all parts of the derrick above the derrick floor not reasonably necessary for ingress and egress including the elevated portion thereof used as a hoist, shall be enclosed with fire resistive, sound-proofing material approved by the Fire Department, and the same shall be painted or stained so as to render the appearance of said derrick as unobtrusive as practicable.

7. That all tools, pipe and other equipment used in connection with any drilling or production operations shall be screened from view, and all drilling operations shall be conducted or carried on behind a solid fence, which shall be maintained in good

condition at all times and be painted or stained so as to render such fence as unobtrusive as practicable.

8. That no materials, equipment, tools or pipe used for either drilling or production operations shall be delivered to or removed from the controlled drilling site except between the hours of 8:00 o'clock a.m., and 6:00 o'clock p.m., on any day, except in case of emergency incident to unforeseen drilling or production operations, and then only when permission in writing has been previously obtained from the Administrator.

9. That no earthen sumps shall be used.

10. Fire fighting equipment as required and approved by the Fire Department shall be maintained on the premises at all times during the drilling and production operations.

11. That within sixty (60) days after the drilling of each well has been completed, and said well placed on production or abandoned, the derrick, all boilers and other drilling equipment shall be entirely removed from the premises unless such derrick and appurtenant equipment is to be used within a reasonable time limit determined by the Administrator for the drilling of another well on the same controlled drilling site.

12. That no oil, gas or other hydrocarbon substances may be produced from any well hereby permitted unless all equipment necessarily incident to such production is completely enclosed within a building, the plans for said building to be approved by the Department of Building and Safety and the

Fire Department. This building shall be of a permanent type, of attractive design and constructed in a manner that will eliminate as far as practicable, dust, noise, noxious odors and vibrations or other conditions which are offensive to the senses, and shall be equipped with such devices as are necessary to eliminate the objectionable features mentioned above. The architectural treatment of the exterior of such building shall also be subject to the approval of the Administrator.

13. That no oil, gas or other hydrocarbon substances may be produced from any well hereby permitted unless all equipment necessarily incident to such production is appropriately screened. A plot plan showing the type and extent of such screening shall be subject to the approval of the Administrator.

14. That no oil, gas or other hydrocarbon substances may be produced from any well hereby permitted where same is located within or immediately adjoining subdivided areas where ten (10) per cent of the lots or subdivided parcels of ground, within one-half ($1/2$) mile radius thereof, are improved with residential structures, unless all equipment necessarily incident to such production is countersunk below the natural surface of the ground and such installation and equipment shall be made in accordance with Fire Department requirements.

15. That there shall be no tanks or other facilities for the storage of oil erected or maintained on the premises and that all oil produced shall be transported from the drilling site by means of an under-

ground pipe line connected directly with the producing pump without venting products to the atmospheric pressure at the production site.

16. That not more than two production tanks shall be installed on said drilling site, neither one of which shall have a rated capacity in excess of one thousand (1000) barrels; that the plans for said tank or tanks, including the plot plan showing the location thereof on the property, shall be submitted to and approved in writing by the Administrator before said tank or tanks and appurtenances are located on the premises; and that said tank or tanks and appurtenances shall be kept painted and maintained in good condition at all times.

17. That any production tanks shall be counter-sunk below the natural surface of the ground and the installation thereof shall be made in accordance with safety requirements of the Fire Department.

18. That no refinery, dehydrating or absorption plant of any kind shall be constructed, established or maintained on the premises at any time.

19. That no sign shall be constructed, erected, maintained or placed on the premises or any part thereof, except those required by law or ordinance to be displayed in connection with the drilling or maintenance of the well.

20. That suitable and adequate sanitary toilet and washing facilities shall be installed and maintained in a clean and sanitary condition at all times.

21. That any owner, lessee or permittee and their successors and assigns, must at all times be insured to the extent of one hundred thousand dollars (\$100,-

000) against liability in tort arising from drilling or production, or activities or operations incident thereto, conducted or carried on under or by virtue of the conditions prescribed by written determination by the Administrator as provided in Subsection F of this Section. The policy of insurance issued pursuant hereto shall be subject to the approval of the City Attorney, and duplicates shall be furnished to him. Each such policy shall be conditioned or endorsed to cover such agents, lessees or representatives of the owner, lessee or permittee as may actually conduct drilling, production or incidental operations permitted by such written determination by the Administrator.

I. Use of Controlled Drilling Site Not Permitted—The Administrator may deny an application for a determination prescribing the conditions under which oil drilling and production may be conducted on a controlled drilling site if he finds that there is available and reasonably obtainable in the same district, or in an adjacent or nearby district within a reasonable distance, one or more other locations where controlled drilling could be conducted with greater safety and security, with appreciably less harm to other property, or with greater conformity to the Comprehensive Zoning Plan.

J. Determination Effective—Appeal—No determination by the Administrator under this Section shall become effective until after an elapsed period of ten (10) days from the date such written deter-

mination is made, during which time an appeal therefrom may be taken to the Board as provided for in Sec. 12.27, Article 2, of the Los Angeles Municipal Code (Board of Zoning Appeals).

K. Violation of Conditions—Penalty—The violations of any determination by the Administrator as provided in this Section, shall constitute a violation of the provisions of this Article and shall be subject to the same penalties as any other violation of the Los Angeles Municipal Code.

L. Description of Districts—The districts referred to in Subsection F of this Section within which the Administrator shall determine and prescribe conditions under which oil drilling and production operations shall be conducted, are described as follows:

Sec. 13.02—Termination of Districts

Any ordinance establishing the districts defined in Sec. 13.00 and 13.01 of this Article, shall become null and void one (1) year after the effective date thereof, unless oil drilling operations are commenced and diligently prosecuted within such one (1) year period. Further, such ordinance shall become null and void one (1) year after all wells in the district have been abandoned as required by law.

Section 3. That Article 4 of Chapter 1 of the Los Angeles Municipal Code (Ordinance No. 77,000, as amended) be, and the same is hereby amended in its entirety so as to read as follows:

Article 4—Building Lines

Sec. 14.00—Establishment of Building Lines—Procedure—Compliance

A. Purpose—In order to promote the public health, safety and general welfare, it is the object and purpose of this Article to provide for the establishment of building lines along any street or portion thereof so as to regulate the distance from the street line at which buildings, structures or improvements may be erected, constructed, established or maintained.

B. Establishment of Building Lines—Procedure. Proceedings for the establishment of building lines along any street or portion thereof may be initiated by the filing of an application signed by one or more of the owners or lessees whose property abuts such street, or by a resolution adopted by the Commission or City Council. Such application or resolution shall designate the street or portion thereof along which the building lines are sought to be established, and the distance from the street line at which such lines are to be located.

Upon the filing of such application or the adoption of such resolution, the Commission shall cause an investigation to be made and shall thereafter present the application or resolution to the City Council together with the recommendations of the Commission.

C. Power of Council to Determine Distances—Upon consideration of such application or resolution, or whenever the public health, safety or general welfare require, the City Council is hereby

authorized and empowered to determine the minimum distance back from the street line for the erection, construction, establishment or maintenance of buildings, structures or improvements along any street or portion thereof and to order the establishment of a line to be known and designated as a building line between which line and the street line no building, structure or improvement shall be erected, constructed, established or maintained.

D. Public Hearing Required—Before ordering the establishment of any building line authorized by Subsection C of this Section, the City Council shall pass a resolution of intention so to do, designating the building line proposed to be established. Such resolution shall be published once in a daily newspaper published and circulated in this City, and designated by the Council for the purpose, and one copy of said resolution shall be posted conspicuously upon the street in front of each block or part of block on any street, public way or place where such building line is proposed to be established. The resolution shall also contain a notice of the day, hour and place when and where any and all persons having any objection to the establishment of the proposed building line or lines, may appear before the City Council and present any objection which they may have to the proposed building line as set forth in the resolution of intention. The time of hearing shall not be less than fifteen (15) nor more than forty (40) days from the date of the adoption of the resolution of intention; and said publication

and posting of said resolution shall be made at least ten (10) days before the time of said hearing.

E. No Building Permits During Proceedings—After the adoption of a resolution of intention and prior to the time the ordinance establishing a building line in such proceedings becomes effective, no building permit shall be issued for the erection of any building, structure or improvement between any proposed building line and the street line, and any permits so issued shall be void.

F. Objections and Protests—At any time not later than the hour set for hearing objections and protests to the establishment of the proposed building line, any person having an interest in the land upon which the building line is proposed to be established, may file with the City Clerk a written protest or objection against the establishment of the building line designated in the resolution of intention. Such protest must be delivered to said Clerk not later than the hour set for said hearing, and no other protests or objections shall be considered. Provided, however, that protestants may appear before the City Council at the hearing, either in person or by counsel, and be heard in support of their protests or objections. At the time set for hearing, or at any time to which the hearing may be continued, the City Council shall hear and pass upon all protests or objections so made, and its decision shall be final.

The City Council shall have power and jurisdiction to sustain any protest or objection and abandon said proceedings, or to deny any and all protests or objections, and order by ordinance the establishment of said building line described in the resolution of intention, or to order the same established with such changes or modifications as said council may deem proper. Said ordinance may refer to the resolution of intention for the description of the building line when the building lines ordered established are the same as described in the resolution of intention.

G. Compliance—From and after the taking effect of any ordinance establishing any building line, and excepting those projections and buildings permitted under Sec. 14.01 of this Article, no person shall erect, construct, establish or maintain any building, structure, wall, fence, hedge or other improvement within the space between the street line and the building line so established. Further, the Department of Building and Safety shall refuse to issue any permit for any building, structure or improvement within such space.

Sec. 14.01—Exceptions—Nonconforming Buildings

A. Permitted Projections — Architectural or landscape features, walls, fences, hedges, and the like, may be constructed, established and maintained so as to extend or project into the space between the street line and an established building line, when and as specifically permitted by Sec. 12.22-C, 20. Further, a marquee may extend into the space be-

tween the street line and an established building line a distance of not more than twelve (12) feet from the face of the building to which it is attached, providing the building be lawfully devoted to a business use.

B. Nonconforming Buildings—A nonconforming building, structure or improvement may be maintained except as otherwise provided in Sec. 12.23-A and Sec. 12.23-D.

Sec. 14.02—Variances—Appeals

A. Authority of Administrator—The Administrator shall have authority to grant variances from the provisions of this Article as provided for in Sec. 12.26-A, 1, (i) and subject to the same limitations and procedure as prescribed in said Sec. 12.26.

B. Right of Appeal—Any decision of the Administrator under this Section may be appealed to the Board in the same manner as provided for in Sec. 12.27.

Sec. 14.03—Filing Fees

Before accepting for filing any application hereafter mentioned, the Department of City Planning shall charge and collect the following fees:

A. Establishment—Change—Repeal—For each application for the establishment, change or repeal of a building line, a fee of ten dollars (\$10.00).

B. Variances—Appeals—For each application for a variance from an established building line or for an appeal to the Board, a fee of ten dollars (\$10.00).

Sec. 14.04—Permits—Administration—
Enforcement

The provisions of Sec. 12.34 (Permits—Licenses—Compliance) and Sec. 12.35 (Administration—Enforcement) shall apply to this Article in the same manner as though stated herein.

Section 4. That Article 5 of Chapter 1 of the Los Angeles Municipal Code (Ordinance No. 77,000, as amended) be, and the same is hereby amended in its entirety so as to read as follows:

Article 5—Petitions, Ordinances, Orders or Resolutions Relating to Acquisition of Land for Public Use or to Zoning

Sec. 15.00—Procedure—Jurisdiction of City Planning Commission

A. Transmittal of Petition or Resolution—Any petition received by the City Clerk and presented to the City Council and any resolution introduced in the City Council having for its purpose the adoption by the City Council of any ordinance, order or resolution ordering or involving the acquisition, establishing, opening, widening, narrowing, straightening, abandoning or vacating of any public street, road, highway, alley, square, park, playground, airport, public building site, or other public way, ground or open space, or the location or appearance of any bridge, viaduct, subway, tunnel or elevated roadway for the use of pedestrian or vehicular traffic or any public building, shall be referred to such Department or Bureau of City Government that is

determined by the Council to have jurisdiction over the matter involved in such petition or proposed ordinance, order or resolution, for report and recommendation thereon to the Council or to a Committee of the Council designated by the Council, before the Council shall grant such petition or adopt or enact any such ordinance, order or resolution.

B. Presented to Commission—The Department or Bureau of City Government to which any petition or resolution is referred by the City Council for initiating any matter contemplated by Subsection A hereof, shall before reporting to the Council upon the particular subject matter, cause the matter to be presented to the City Planning Commission for its consideration and action thereon, pursuant to the provisions of Section 97 of the Los Angeles City Charter, and such Bureau or Department shall cause its report to the City Council on the subject matter of the petition or proposed ordinance, order or resolution, to be transmitted to the City Council, together with the original report of the City Planning Commission relating thereto.

C. Commission Action Necessary—Before any ordinance, order or resolution relating to any of the matters referred to in Subsection A hereof, or before any ordinance relating to zoning is presented to the Council by the City Attorney for consideration, said ordinance, order or resolution shall first be submitted by the City Attorney to the City Planning Commission for its consideration and endorsement upon the draft of proposed ordinance, order or resolution of its approval or disapproval. In the

event of the Commission's disapproval of such ordinance, order or resolution, the Commission shall attach thereto in duplicate its reasons for disapproval. Such ordinance, order or resolution shall be returned by the City Planning Commission to the City Attorney for transmittal to the City Council or its Committee.

D. Time Limit—The City Planning Commission shall stamp the date of receipt of any request for report on or approval of any petition, ordinance, order or resolution, on the face thereof, and said Commission shall approve or disapprove the petition, ordinance, order or resolution within thirty (30) days from date of receipt of the same. If the same be disapproved, the City Planning Commission shall advise the Bureau or Department submitting the matter, of its disapproval and the reasons therefor, within such thirty (30) day period.

Section 5. That Article 6 of Chapter 1 of the Los Angeles Municipal code (Ordinance No. 77,000, as amended) be, and the same is hereby amended in its entirety so as to read as follows:

Article 6—War Emergency Regulations

Sec. 16.00—Postponement of Construction of Garage Facilities

A. Postponement Permissible—Notwithstanding any other provision of this Code, the construction of garage buildings required in connection with any residential use of any lot may be delayed until after the expiration of a period of six (6) months immediately after the date of the lifting, repeal, cancel-

lation or rescission of federal regulations prohibiting or restricting the use of building materials for such purposes, that date to be determined, for the purpose of this Section, by the Board of Building and Safety Commissioners.

B. Building Permits—Floor Slabs Required—
In connection with the construction of or conversion of each residential development for which garage facilities are required by any provision of this Code, building permits for the garage structures so required must be obtained in advance as in all other cases, and a slab of concrete of such other type of durable flooring as may be approved by the Department of Building and Safety shall be installed to serve as the floor for the future garage building, and a driveway of concrete, asphalt or other durable material approved by the Department of Building and Safety shall be installed to provide access to the floor, so as to permit its use for the off-street parking of tenants' automobiles pending the ultimate construction of the required garage buildings. The slab of floor, and the driveway required hereby shall be constructed concurrently with the construction of the residential improvement or the conversion of an existing structure to such use.

C. Records to Be Kept—Notice to Complete—
The Department of Building and Safety shall keep a record of each case where the construction of garage buildings is to be delayed as permitted by this Section. When the period within which such delay has been permitted has expired, the Department of Building and Safety shall give notice, by

mail, to the owner or person in possession and control of the property involved, that the period of postponement has terminated and that the construction of the required garage buildings must be commenced, carried continuously to completion and completed within a reasonable time, to be determined by the Board and stated in the notice.

D. Completion of Garage—When Required—After the notice provided for above has been mailed, and after the reasonable time, as determined by the Board Building and Safety Commissioners, has expired within which the construction of the required garage buildings could have been completed, it shall be a misdemeanor for the owner or person in possession or control of any lot or parcel of land upon which the construction of any required garage building has been postponed pursuant to this Section and not completed, to use or let or permit the use of, any such lot or parcel of land for residential purposes.

Sec. 16.01—Special Care Homes—May Be Temporarily Permitted in Certain Residential Zones

A. Definitions—For the purpose of this Section, the following words, terms, or phrases are defined as follows and shall be construed, applied and used as herein defined, unless it shall be apparent from the context that they have a different meaning:

1. “Guest,” shall mean a person housed in a special care home, who is able to leave the premises unassisted.

2. "Patient," shall mean a person housed in a special care home, who is not able to leave the premises unassisted.

3. "Special Care Home," shall mean any building, structure or portion thereof, (other than hospitals equipped or used for surgical or obstetrical care) used for the reception, housing or care, with or without compensation, of two (2) and not exceeding a total of twelve (12) patients and guests, not related to the operator, who, for any cause, require care or attention and are kept for a period of more than twenty-four (24) hours.

B. Temporary Use—Notwithstanding any other provisions of this Chapter, any person may, with the express written permission of the Administrator, use existing buildings in "R4" and "R5" Zones for the operation of special care homes provided that the floor space of any such buildings so used shall not be increased for such use and also provided that the floor space shall not be so rearranged that it would reasonably preclude the use of such buildings for purposes otherwise permitted in the zone in which the property is located. No such permission for the operation of a special care home shall be valid or effective for any purpose except for the duration of the present war and six (6) months thereafter; and any such permission and any use allowed hereunder shall be subject to all restrictions hereinafter in this Section set forth and to such conditions not in conflict herewith which the Administrator may deem necessary or advisable to impose in the granting of any application filed here-

under in order to protect the peace and quiet of occupants of contiguous property.

C. Application—Notice—Hearing—Any application for a permit hereunder shall be filed with the Administrator in the public office of the Department of City Planning upon forms and accompanied by such data as the Administrator may require. Such application shall be verified by the applicant attesting to the truth and correctness of all facts and information presented with or contained in, such application.

Upon the filing of such verified application the Administrator shall set the matter for public hearing. Notice of the pending application and of the hearing thereon shall be given by mailing a postal card or letter notice not less than five (5) days prior to the date of such hearing to the owners of all property within a radius of one hundred-fifty (150) feet from the exterior limits of the property involved in the application, using for this purpose the last known name and address of such property owners as shown upon the records of the City Clerk. Provided, however, that if the owners of all the private property within such radius of one hundred-fifty (150) feet from the exterior of the property involved in such application shall have joined in the application, then no notice or hearing shall be required.

D. Fee—Each application for a permit hereunder shall be accompanied by a filing fee of twenty-five dollars (\$25.00).

E. Denial — Revocation — The Administrator may deny any application made hereunder, or suspend or revoke any permit issued hereunder, whenever he shall determine that the exercise of the privilege involved would, or does, unreasonably interfere with the peace and quiet of the occupants of contiguous property, or that it bears no relation to the emergency arising from the war.

F. Other Permits—Licenses, Etc.—This Section shall not modify or affect in any way the duty of any applicant to obtain any other permit or license which may be required under any other provision of this Code or under any State law.

Sec. 16.02—Variances

A. Authority of Administrator—Notwithstanding any of the provisions of Article 2, Chapter 1, of this Code, to the contrary, the Administrator shall have the power to grant variances from the provisions of the regulations prescribed by said Article for the following purposes, regardless of the zone where any of the following may be located or conducted:

1. The conduct or operation of any business or enterprise engaged primarily in the manufacture of, assembling of, repair of, or distribution of any material, equipment or parts for use by the armed forces of the United States, its Allies, or recipients of lend-lease aid from the United States.

2. The conduct of or operation of any business or enterprise engaged primarily in the performing of any service or services for the United States or its Allies in connection with the war effort.

3. To permit the location and operation of any bona fide service or charitable organization engaged directly in aiding or assisting the war effort of the United States or any of its Allies.

4. To permit an office for the general practice of a dentist, physician or other person authorized by law to practice medicine or healing in an existing dwelling or apartment in the "R3," "R4" or "R5" Zone, provided such dwelling or apartment is not enlarged nor the residential character of the building changed.

Such variance may be granted without notice or public hearing and the Administrator shall give to any such application precedence over any other matter pending before him.

Any variance granted under the provisions of this Subsection shall be valid, unless sooner revoked, for a period of six (6) months after the Administrator shall have determined that the war emergency no longer exists, and shall be void thereafter.

The Administrator may revoke a variance granted under this Subsection only when he first finds by competent evidence, after giving the notice of hearing prescribed by Section 22.02 of this Code, that the particular building, structure or ground covered by the variance is no longer used or needed for the purpose contemplated by the provisions of this Section.

B. Issuance of Permit—Notwithstanding any provision of this Chapter to the contrary, upon the granting by the Administrator of a variance under the provisions of Subsection A hereof, any necessary building permit may be issued forthwith for the

construction, alteration or repair of a structure required to carry out the purposes of the variance.

C. Extension of Time Limit—Whenever upon application and after due investigation, the Administrator shall determine that any privilege granted by any variance under this Chapter could not be utilized within the time limit of one hundred-eighty (180) days imposed by this Chapter, and that the reason therefor was the inability to obtain building materials or essential equipment due to priorities, governmental restrictions or other factors resulting from the existence of war, the Administrator may, by written grant, extend the time limit mentioned provided he determines that such extension would not be in conflict with the basic purpose of that condition or violative of the purpose of this Section. The grant of such an extension as to any variance which may have become void by reason of the breach of the condition mentioned, shall revive the variance. No such extension shall be effective after the expiration of a period of six (6) months from the date of the declaration by competent governmental authority that the present state of war or national emergency has ceased, and any such extension may be terminated by the Administrator, upon one hundred-eighty (180) days' notice, if he shall find, after due investigation, that none of the causes justifying the grant of the extension under the provision hereof, any longer exists.

Section 6. That Subsection (a), Sec. 32.06.1 of the Los Angeles Municipal Code (Ordinance No.

77,000, as amended) be, and the same is hereby amended so as to read as follows:

(a) Where Permitted—No person shall use, or cause or allow to be used for sleeping purposes, any trailer coach or vehicle while the same is parked, camped, stored or placed at any place other than a public camp, except that one trailer coach may be parked, stored or placed upon any premises improved with a dwelling being lawfully used and occupied as and for living and housekeeping purposes, with the express consent of the tenant or occupant thereof, where there be adequate sanitary and toilet facilities convenient and available to the occupants of such trailer coach at all times while the same is upon such premises and when permitted by the zoning regulations applying to the premises.

Section 7. That Subsection (d), Sec. 34.04 of the Los Angeles Municipal Code (Ordinance No. 77,000, as amended) be, and the same is hereby amended so as to read as follows:

(d) The provisions of Subsections (b) and (c) hereof shall not apply to the "A1," "A2," and "RA" Zones as set forth in Article 2, Chapter 1 of the Los Angeles Municipal Code. In such districts, no swine shall be kept on any portion of premises, the whole of which is less than twenty thousand (20,000) square feet in area; one swine may be kept on any portion of premises, the whole of which embraces at least twenty thousand (20,000) square feet in area;

two swine may be kept on any portion of premises, the whole of which embraces at least two (2) full acres; and one additional swine may be kept for each additional full acre comprising such premises, up to and including a total of five swine for a five (5) acre area. Provided, however, that no swine shall be kept, maintained or fed within one hundred (100) feet from the nearest church, school, dwelling, apartment house, hotel, office building, business establishment, public street, public building, dairy or milk house, nor within fifty (50) feet from any dairy barn. More than five swine may be kept in such districts on any portion of the premises, the whole of which embraces an area of more than five (5) acres only when permitted by the Zoning Administrator under Sec. 12.25-A, 1 of said Code, and provided they are kept, maintained or fed not less than fifty (50) feet from any dairy barn and not less than one hundred (100) feet from the dwelling of the owner or caretaker and from any dairy or milk house, and not less than two hundred (200) feet from any other dwelling, and from any church, school, apartment house, hotel, office building, business establishment, public street or public building.

Section 8. That Sec. 34.15 of the Los Angeles Municipal Code (Ordinance No. 77,000, as amended) be, and the same is hereby amended so as to read as follows:

Sec. 34.15—Bees—Keeping Of

No person shall establish or maintain any hive or box where bees are kept, or keep any bees on the premises within three hundred (300) feet of any dwelling (except the dwelling of the owner of such bees or within one hundred (100) feet of any exterior boundary of the property in which the hive or box is located, except:

(a) that the above regulations shall not apply in the "A1," "A2" or "RA" Zones as set forth in Article 2, Chapter 1 of the Los Angeles Municipal Code:

(b) that a hive or box for the keeping of bees may be located and kept within a schoolhouse for the purpose of study or observation;

(c) that a hive or box for the keeping of bees may be located and kept in a physician's office or laboratory for medical research or treatment, or for scientific purposes;

(d) that no bees permitted to be kept upon any premises under Subsection (b) and (c) hereof, shall be permitted to fly at large.

Section 9. That Sec. 36.11 of the Los Angeles Municipal Code (Ordinance No. 77,000, as amended) be, and the same is hereby amended so as to read as follows:

Sec. 36.11—Undertaking Establishments—Permits,
Location Of

No morgue, mortuary, funeral parlor, undertaking establishment or undertaking chapel, shall hereafter be established, conducted or maintained ex-

cept in a "C2," "C3," "C4" or less restricted zone, as defined in Article 2, Chapter 1 of the Los Angeles Municipal Code, when permitted by the Zoning Administrator under the provisions of Sec. 12.25-A, 3 of said Code; provided, however, that any such use heretofore established pursuant to the provisions of Ordinance No. 31,746 (N.S.), may be continued.

Section 10. That Subdivisions (4) and (5), Subsection (A) of Section 57.55 of the Los Angeles Municipal Code (Ordinance No. 77,000, as amended) be, and the same are hereby amended so as to read as follows:

(4) "Controlled Drilling Site" as used in this section, shall mean that particular location upon which surface operations, incident to oil well drilling or deepening and the production of oil, gas, or other hydrocarbon substances, may be permitted under the terms of this section subject to the written determination by the Zoning Administrator prescribing conditions. A controlled drilling site must lie entirely within one (1) or more districts described in Subsection L of Sec. 13.01 of this Code.

(5) "Oil Drilling District" as used in this section shall mean a district described in Subsection L of Sec. 13.01 of this code.

Section 11. That paragraph (b), Exceptions, Subdivision 1 of Subsection (B) of Section 57.55 of the Los Angeles Municipal Code (Ordinance No. 77,000, as amended) be, and the same is hereby amended so as to read as follows:

(b) On a controlled drilling site where oil well derricks are grouped as provided in Sec. 13.01 of this Code, the Board of Fire Commissioners may permit the erection of oil well derricks at locations less than seventy-five (75) feet from any public street or highway, or less than fifty (50) feet from an outer boundary line where it is found that no undue hazard will be created, and that there is no probability of buildings with an aggregate floor area in excess of four hundred (400) square feet being placed at any time within fifty (50) feet of such proposed derrick.

Section 12. That paragraph (a) Exception, Subsection (C) of Section 57.55 of the Los Angeles Municipal Code (Ordinance No. 77,000, as amended) be, and the same is hereby amended so as to read as follows:

(a) That this spacing shall not apply to any controlled drilling site in any oil drilling district in an urbanized area as enumerated in Subsection L of Sec. 13.01 of this Code.

Section 13. That paragraph (a) Exceptions, Subsection (O) of Section 57.55 of the Los Angeles Municipal Code (Ordinance No. 77,000, as amended) be, and the same is hereby amended so as to read as follows:

(a) The provisions of this subsection shall not apply to any controlled drilling site in any oil drilling district in an urbanized area as enumerated in Subsection L of Sec. 13.01 of this Code.

Section 14. That paragraph (a) Exception, Subsection (P) of Section 57.55 of the Los Angeles Municipal Code (Ordinance No. 77,000, as amended) be, and the same is hereby amended so as to read as follows:

(a) The Provisions of this subsection shall not apply to any controlled drilling site in any oil drilling district in an urbanized area as enumerated in Subsection L of Sec. 13.01 of this Code.

Section 15. That paragraph 1, and subparagraphs (a) and (b), paragraph 2, Subsection (E) of Section 57.64 of the Los Angeles Municipal Code (Ordinance No. 77,000, as amended) be, and the same are hereby amended so as to read as follows:

1. Storage—No tank vehicle, the cargo tank or tanks of which contain inflammable liquids or vapors, shall be stored in any public or private garage or upon any privately owned open premises and no such tank vehicle shall be stored within fifty (50) feet of any open flame, unless otherwise approved by the Chief or his duly authorized representative; provided, however, that such tank vehicle may be stored in the “M1,” “M2” or “M3” Zones set forth in Article 2, Chapter 1 of this Code.

2. Repairs to Tank Vehicles

(a) No tank vehicle when located outside of the “M1,” “M2” or “M3” Zones set forth in Article 2, Chapter 1 of this Code, shall be repaired, except in emergencies. Further, all inflammable liquids and vapors shall have been removed from the cargo tanks or neutralized during the period of repair.

(b) Any tank vehicle having a cargo tank or tanks which contain any inflammable liquid or vapors, may be repaired in any public or private garage or upon any privately owned open premises located in the "M1," "M2" or "M3" Zones set forth in Article 2, Chapter 1 of this Code, provided that such repairs do not involve the use of any open flame or other device whose temperatures exceed six hundred degrees Fahrenheit (600°F) and provided further that such tank vehicle shall at all times be at least fifty (50) feet from any open flame.

Section 16. That Sec. 67.03 and Sec. 67.15 of the Los Angeles Municipal Code (Ordinance No. 77,000, as amended) be, and the same are hereby amended so as to read as follows:

Sec. 67.03—Semi-Business District Defined

For the purpose of this Article, the semi-business district shall consist of and include all lots and parcels of land within all commercial or industrial zones established under Article 2, Chapter 1 of this Code (Comprehensive Zoning Plan of the City of Los Angeles) or any amendments thereto, fronting on both sides of the same street within any block herein more than fifty (50) per cent of the occupied frontage on both sides of such street within such block is devoted to or utilized for business purposes other than outdoor advertising structures or advertising statuary, as distinguished from purely residential purposes; provided, however, that nothing herein shall be deemed to affect or supersede the provisions of Sec. 12.13, Article 2, Chapter 1 of this

Code, relating to the "C1" Limited Commercial Zone.

For the purpose of this Article the term "block" is defined to mean that portion of a street (hereinafter referred to as the primary street) between the center lines of two secondary streets which intersect both side lines of such primary street. In cases where the secondary street intercepts only one side line of such primary street, a straight line drawn from the center line of the intercepting secondary street at its terminus to the nearest point on the opposite side of said primary street shall limit the block on both sides of the primary street.

Sec. 67.15—Structures Prohibited—Residence Districts—Exceptions

No person shall erect or construct or cause or permit to be erected or constructed any outdoor advertising structure or advertising statuary within any resident district as defined by this Article.

Provided, however, nothing in this section contained shall be deemed as prohibiting the erection and maintenance of any real estate sign advertising the property upon which it stands, or the person, firm or corporation having the listing of such property or any identification signs erected and maintained for the purpose of identification only such as physician and surgeon name signs, apartment house signs, or any sign or surface used exclusively to display official notices issued by any court or public office in performance of a public duty or any accessory sign or any post sign; and provided, fur-

ther, that the provisions of Article 2, Chapter 1 of this Code (Comprehensive Zoning Plan of the City of Los Angeles) regulating the size and location of certain of the above signs, shall also be complied with. All real estate signs and identification signs other than accessory signs or post signs permitted in residence districts by the provisions of this Section shall not have a surface area greater than twenty (20) square feet, and shall not be erected or maintained upon any property within the residence district at a less distance from any public sidewalk, street, alley or other public place than is required for buildings or structures upon such lots or parcels of land so restricted by any ordinance of the City of Los Angeles now in effect or to be hereafter enacted, except as provided in Sec. 67.13 of this Article.

Provided, however, that nothing in this section contained shall be deemed as permitting the erection or maintenance of any accessory sign or post sign upon any lot or parcel of land within any residential zone, as established under Article 2, Chapter 1 of this Code (Comprehensive Zoning Plan of the City of Los Angeles) or any amendments thereto, unless a conditional variance has been granted by the City Council, the Zoning Administrator or Board of Zoning Appeals permitting the use of said lot or parcel of land for commercial or industrial purpose, and providing in said conditional variance for the erection and maintenance of said accessory sign or post sign; provided, however, that any accessory sign or post sign erected or maintained under the terms of a conditional

variance or any lot or parcel of land within any residential zone, as established under said Article 2, Chapter 1 of this Code or any amendments thereto, shall comply with the provisions of this Article.

Section 17. That Subsection (b), Division 16 of Sec. 91.1601 of the Los Angeles Municipal Code (Ordinance No. 77,000, as amended) be, and the same is hereby amended so as to read as follows:

(b) Fire District No. 2—Fire District No. 2 shall be all of the territory designated by Article 2, Chapter 1 of the Los Angeles Municipal Code in the “C2,” “C3,” “C4,” “CM,” “M1,” “M2” and “M3” Zones, as set forth in Article 2, Chapter 1 of this Code, except that territory located in Fire District No. 1.

Section 18. That Subsection (a), Division 17 of Sec. 91.1702 of the Los Angeles Municipal Code (Ordinance No. 77,000, as amended) be, and the same is hereby amended so as to read as follows:

(a) Height. The height of a building shall be the vertical distance between the highest point of the adjoining sidewalk or ground surface and the ceiling of the top story, of the building, provided that the height measured from the lowest point of the adjoining ground surface shall not exceed the maximum height allowed by this Code by more than fifteen (15) feet. Provided, further, that nothing herein contained shall be construed as modifying the height regulations as set forth in Article 2, Chapter 1 of this Code.

Section 19. That Subsections (a), (b), (c), (d), (e), (f) and (g), Sec. 91.4802 of the Los Angeles Municipal Code (Ordinance No. 77,000, as amended) be, and the same are hereby amended so as to read as follows:

(a) **Front Yard.** In any residential zone, every lot shall be provided with a front yard of the depth prescribed in Article 2, Chapter 1 of the Los Angeles Municipal Code.

(b) **Side Yards.** In any residential, commercial or industrial zone, every lot occupied by a dwelling shall have a side yard, on each side of a main building, of the width prescribed in Article 2, Chapter 1 of the Los Angeles Municipal Code. Further, where the side of a lot in a commercial or industrial zone abuts upon the side of a lot in a residential zone, a commercial or industrial building shall have a side yard, on that side of the main building adjacent to the residential zone, of the width prescribed in said Article 2, Chapter 1.

(c) **Rear Yard.** In any residential, commercial or industrial zone, every lot occupied by a main building shall be provided with a rear yard of the depth prescribed in Article 2, Chapter 1 of the Los Angeles Municipal Code.

Exception:

Accessory buildings may be located in front, side or rear yards when and as provided for in Article 2, Chapter 1 of the Los Angeles Municipal Code.

(d) **Accessory Buildings.** The location of accessory buildings on a lot is provided for in

Article 2, Chapter 1 of the Los Angeles Municipal Code.

(e) Yard Specifications. The width of the required side yard shall be measured horizontally from the nearest point of the side lot line toward the nearest part of the main building.

The depth of the required rear yard shall be measured horizontally from the nearest part of the main building toward the nearest point of the rear lot line.

(f) Projections Into Yards—Porte cocheres, cornices, eaves, belt courses, sills, canopies, chimneys, fire escapes, open stairways or balconies and other similar architectural features may project into yards as provided for in Sec. 12.22-C, 20 of Article 2, Chapter 1 of the Los Angeles Municipal Code.

(g) Special Requirements. Buildings on lots of peculiar shape or location on or hillside lots shall be located as required in Article 2, Chapter 1 of the Los Angeles Municipal Code.

Section 20. That Ordinance No. 79,752 be, and the same is hereby amended so as to read as follows:

An Ordinance prescribing fees to be collected by the Department of City Planning of the City of Los Angeles for the filing of subdivision maps.

The People of the City of Los Angeles do ordain as follows:

Section 1. That before accepting for filing any subdivision map hereinafter mentioned, the Department of City Planning shall charge and collect the following filing fees, to-wit:

(A) For each and every tentative subdivision map submitted in accordance with the Statutes of the State of California or any ordinance of the City of Los Angeles, the sum of twenty-five dollars (\$25.00); and in addition thereto:

(1) For each and every lot shown on such subdivision map, excepting such lots as are shown at the request of the City Engineer of the City of Los Angeles to facilitate the description of land to be acquired in condemnation proceedings, the sum of fifty cents (\$0.50);

(2) For each additional lot shown on a second tentative subdivision map filed within one (1) year, the sum of fifty cents (\$0.50);

Provided, however, that the filing fee for a one-lot subdivision map, when accompanied by the written opinion of the County Assessor of the County of Los Angeles or the City Engineer of the City of Los Angeles that the purpose of said subdivision map is for the simplification of assessment or correction of the legal description of the land included therein, shall be five dollars (\$5.00) instead of the regular twenty-five (\$25.00) fee.

(3) For each additional lot shown on the final subdivision map at the request of the City Planning Commission, the sum of fifty cents (\$0.50); such additional fee to be paid prior to the submission of said final subdivision map to the City Council for approval.

(B) The provisions of this ordinance shall not apply to subdivision maps filed by various departments of the government of the City of Los Angeles who do not control their own funds, but shall apply to the Board of Education, the Departments of Harbor, Library, Parks, Playground and Recreation, Pension, and Water & Power, all of which control their own funds.

(C) For the purpose of this ordinance, "second tentative subdivision" shall mean a map involving a revised arrangement of any property for which a tentative subdivision map has previously been submitted, but in no case including additional area unless first approved by the City Planning Commission.

Section 21. Where the zone of any property shown on a zone map adopted by ordinance prior to the effective date of this ordinance is changed from said zone to a more restricted zone under Article 2, Section 1 of this ordinance, the provisions of said Article 2 shall not become operative as to such property for a period of ninety (90) days from the effective date of said Article 2, and during such ninety (90) day period the zoning regulations in force immediately prior to the effective date of said Article shall apply.

Section 22. That Article 8 of Chapter 1 of the Los Angeles Municipal Code and paragraph (d) Section 31.11 of Article 1, Chapter 3 of said Code, be and the same are hereby repealed; and that Or-

dinance No. 19,534 (N.S.), Ordinance No. 31,746 (N.S.), Ordinance No. 44,434 (N.S.), Ordinance No. 58,647 and Ordinance No. 65,050 and all ordinances amendatory to said ordinance be, and the same are hereby repealed.

Section 23. The City Clerk shall certify to the passage of this ordinance and cause the same to be published once in The Los Angeles Daily Journal and The Los Angeles News.

I hereby certify that the foregoing ordinance was introduced at the meeting of the Council of the City of Los Angeles of February 28, 1946, and was passed at its meeting of March 7, 1946.

WALTER C. PETERSON,
City Clerk.

By A. M. MORRIS,
Asst. City Clerk.

Approved this 15th day of March, 1946.

FLETCHER BOWRON,
Mayor.

File No. 21084.

[Endorsed]: Filed Nov. 14, 1947. [55]

In the United States District Court, Southern
District of California, Central Division

No. 7765-P H

HENRY WALLACE WINCHESTER, et al.,
Plaintiffs,

vs.

J. D. GREGG, and the CITY OF LOS ANGELES,
a municipal corporation,

Defendants.

TEMPORARY RESTRAINING ORDER

It appearing by the verified complaint, herein, that immediate and irreparable injury, loss, and damage, will result before notice can be served and a hearing had thereon, and other good cause appearing therefor, it is hereby ordered that the defendants herein, their agents, servants, representatives and employees be and they are hereby restrained, pending the further order of the Court herein, from excavating, or conducting any other operation for the production of rock, sand, or gravel within or upon that certain real property described in plaintiffs' complaint herein and known and described as follows, to wit: Lots 1, 2, 4, 5, 6, 7, 13 and 14 in Block 19; the Easterly 150 feet of Lot 12 in Block 8; Lots 4 to 9 inclusive, and Lots 15 to 19 inclusive, and Lots 21 and 22, and the Easterly 280 feet of Lot 14, in Block 17; of the Los Angeles Land and Water Company's subdivision of a part of the Maclay Rancho as per map recorded in [57] Book 3 of Maps at Pages 17 and 18 in the Office of the County Recorder of Los Angeles County, California.

This temporary restraining order is issued because it appears to the Court that unless immediately restrained, said defendant John D. Gregg will continue to excavate with a six ton power shovel upon the land covered by the variance permit described in the Complaint herein, for production of rock, sand, and gravel, from said land and will remove said materials from said property, and dispose of them in the market, and that the conduct of said operations will seriously, substantially, and irreparably damage plaintiffs, by interfering with their comfortable enjoyment and use of their respective properties and homes described in the Complaint herein, and depreciating the value of their said properties respectively, and by creating a large deep pit upon the property excavated, which cannot reasonably be refilled and which will constitute permanently a hazard and detriment to the health and safety of said plaintiffs and their families, and to their said properties.

This order shall be effective upon plaintiffs furnishing and filing with the Clerk of the above-entitled court a written undertaking on the part of the plaintiffs with a surety company as surety, to the effect that they will pay to the defendants such costs and damages not exceeding the sum of \$5000.00 as the defendants may incur or sustain by reason of the foregoing restraining order if the court finally decides that the defendants were wrongfully restrained herein.

Dated this 15th day of November, 1947.

/s/ PEIRSON M. HALL,
Judge.

[Endorsed]: Filed Nov. 15, 1947. [58]

[Title of District Court and Cause.]

NOTICE OF AND MOTION TO DISMISS FOR
LACK OF JURISDICTION OF SUBJECT-
MATTER

To the Plaintiffs Above Named and to Oliver O.
Clark and Robert A. Smith, Attorneys for
Plaintiffs:

You Will Please Take Notice that on the 8th
day of December, 1947, at the hour of 10:00 o'clock
a.m., or as soon thereafter as counsel may be heard
in the court room of Judge Peirson M. Hall, Court
Room Number 3, Second Floor Post Office and
Courthouse Building, Los Angeles, California, De-
fendant J. D. Gregg will separately move, and
hereby does move, the said court to dismiss the
action on the ground that the court lacks jurisdic-
tion because it appears on the face of the complaint
that no federal question is involved sufficient to in-
voke the jurisdiction [59] of the United States
District Court.

Said motion will be made and based on the com-
plaint in equity for injunction and damages on file
in the above-entitled cause and will be made upon
the ground that no substantial federal question is
involved.

Dated December 1, 1947.

/s/ DONALD J. DUNNE,
WOOD, CRUMP, ROGERS,
ARNDT & EVANS,

/s/ GUY RICHARDS CRUMP,
/s/ ROLLIN L. McNITT,

Attorneys for Defendant
J. D. Gregg. [60]

Received copy of the within Notice of and Motion to Dismiss this 1st day of December, 1947, for Lack of Jurisdiction of Subject-Matter.

/s/ OLIVER O. CLARK,
By /s/ M. BAILUS,
Attorney for Plaintiffs.

[Endorsed]: Filed Dec. 1, 1947. [61]

[Title of District Court and Cause.]

MOTION TO DISSOLVE
TEMPORARY RESTRAINING ORDER

Comes now defendant J. D. Gregg, for himself alone, and moves the court for an order dissolving the temporary restraining order granted herein on the 15th day of November, 1947, upon the grounds that:

(1) The temporary restraining order was granted in violation of Rule 65(b) of the Rules of Civil Procedure for the District Courts of the United States in that:

- (a) No specific facts are set forth in the complaint that immediate injury, loss or damage would result to the plaintiffs before notice of the application could have been served and a hearing had thereon;
- (b) No specific facts are set forth in the complaint that irreparable injury, loss or damage

would result to the plaintiffs before notice of the application could have been served and a hearing [62] had thereon;

(c) The temporary restraining order does not define the injury, nor does it state why the injury is irreparable;

(d) The temporary restraining order does not state why it was granted without notice.

(2) The complaint fails to state a claim against this defendant upon which relief can be granted.

(3) This court has no jurisdiction of the subject matter of the case which would authorize it to grant a temporary restraining order, in that there is no federal question involved and no diversity of citizenship.

This motion is made and based upon the notice of motion herein, upon the complaint upon which the temporary restraining order was granted, and upon the records and files in this action.

Dated November 29, 1947.

DONALD J. DUNNE,
WOOD, CRUMP, ROGERS,
ARNDT & EVANS,
ROLLIN McNITT,
/s/ GUY RICHARDS CRUMP,
Attorneys for defendant
J. D. Gregg. [63]

STATEMENT OF REASONS IN SUPPORT OF
MOTION TO DISSOLVE TEMPORARY
RESTRAINING ORDER

The motion of defendant J. D. Gregg is based upon the fact:

(1) That the complaint fails to state a claim against this defendant upon which relief can be granted;

(2) That no federal question is stated;

(3) That the complaint does not show any necessity for the issuance of a temporary restraining order without notice;

(4) That the provisions of Rule 65b of the Rules of Federal Procedure have not been followed in the order, in that:

(a) No specific facts are set forth in the complaint that immediate injury, loss or damage would result to the plaintiffs before notice of the application could have been served and a hearing had thereon;

(b) No specific facts are set forth in the complaint that irreparable injury, loss or damage would result to the plaintiffs before notice of the application could have been served and a hearing had thereon;

(c) The temporary restraining order does not define the injury, nor does it state why the injury is irreparable;

(d) The temporary restraining order does not state why it was granted without notice. [64]

POINTS AND AUTHORITIES

Rule 65 of the Rules of Civil Procedure for the District Courts of the United States.

“Rule 65. Injunctions

“(a) Preliminary; Notice. No preliminary injunction shall be issued without notice to the adverse party.

“(b) Temporary Restraining Order; Notice; Hearing; Duration. No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk’s office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on

for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 [65] days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

“(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of any officer or agency thereof.

“(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

“(e) Employer and Employee; Interpleader; Constitutional Cases. These rules do not modify the Act of October 15, 1914, c. 323, Secs. 1 and 20 (38 Stat. 730), U.S.C., Title 29, Secs. 52 and 53, or the Act of March 23, 1932, c. 90 (47 Stat. 70), U. S. C., Title 29, c. 6, relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Section 24 (26) of the Judicial Code as amended, U.S.C., Title 28, Sec. 41 (26), relating to preliminary injunctions in actions of interpleader or in the nature [66] of interpleader; or the Act of August 24, 1937, c. 754, Sec. 3, relating to actions to enjoin the enforcement of acts of Congress.

Lawrence vs. St. Louis-San Francisco Ry. Co., 274 U. S. 588, 71 L. Ed. 1219.

United Railroads vs. City and County of San Francisco (C.C. N.D. Cal.), 180 Fed. 948.

Worth Manfg. Co. vs. Bingham (C.C.A. 4-1902), 116 Fed. 785.

Harness vs. City of Englewood (D.C.D. Colo.-1930), 15 Fed. Supp. 140.

We refer to, and by reference make a part hereof, the points and authorities filed concurrently herewith in opposition to the application for a preliminary or interlocutory injunction. [67]

Received copy of the within Motion Statement of Points and Authorities this 1st day of December, 1947.

/s/ OLIVER O. CLARK,
By /s/ M. BAILUS.

[Endorsed]: Filed Dec. 1, 1947. [68]

In the United States District Court, Southern
District of California, Central Division

No. 7765-P. H.

HENRY WALLACE WINCHESTER, et al.,
Plaintiffs,

vs.

J. D. GREGG and the CITY OF LOS ANGELES,
a municipal corporation,

Defendants.

AFFIDAVIT OF JOHN D. GREGG IN OPPO-
SITION TO APPLICATION FOR PRE-
LIMINARY INJUNCTION

State of California,
County of Los Angeles—ss.

John D. Gregg, being first duly sworn on oath,
deposes and says:

That he is one of the defendants in the above
entitled action and is the person described as the
owner of the real property in Paragraph IV of
plaintiffs' Complaint in Equity herein; that ever
since the year 1934 affiant has been operating a
rock, sand and gravel pit and processing plant on
the real property immediately adjoining the real
property described in Paragraph IV of said Com-
plaint in Equity and lying southerly of Gleanoaks
Boulevard; that the excavation of rock, sand and
gravel in the manner employed by this affiffiant,
to-wit, by causing the banks of the excavation to

be dampened and by removing the said rock, sand and gravel with an electric shovel and transporting the same to a processing plant by a conveyor belt system, does not cause any dirt or dust to arise in such a manner as the same would or does pollute the air or travel beyond the property lines of the real property described in Paragraph IV of [70] plaintiffs' Complaint in Equity or be deposited upon the properties, or upon the homes, or upon the persons of plaintiffs, or any of them, or upon any other persons beyond the limits of affiant's said property; that it is not a natural or necessary consequence of the excavation for commercial production of rock, sand or gravel in the manner proposed by affiant that such operation would cause a pollution of the air, or constitute a dangerous, obnoxious or deleterious condition either upon the premises of the said plaintiffs, or upon the highways, or upon any places of public gatherings otherwise, or at all; that on the contrary, the operations which have been conducted by affiant since the year 1934 on the immediately adjoining premises have not, and do not, cause any dust, dirt, or pollution of the air whatsoever.

Affiant further states that neither the operation of an electric shovel for excavation purposes on the said property, nor the operation of a primary crusher upon said property would cause any loud, rasping, grinding, or obnoxious noises which could be heard beyond the property limits of said property and that such operations would not as a natural or necessary consequence thereof substantially or

materially, or otherwise, disturb said plaintiffs, or any of them, or any other persons whomsoever, or impair or diminish the free and proper use of their properties and homes in any manner whatsoever;

That it is not true that there is any reasonable possibility or expectancy that the side walls of any excavation made by affiant in the manner designated and provided in the permit granted by the City of Los Angeles would cause erosion or recession thereof, which in any way would, or could, encroach upon any of the lands which bound the so-called "critical area" or upon any public streets or highways or upon any lands abutting upon streets opposite said "critical area"; that on the contrary, the slope which will be maintained by affiant, to-wit; one (1) foot of horizontal to one (1) foot of vertical decline, would make it a physical impossibility for any recession of the said excavation walls to occur, and that excavation at such a slope is in accordance with good and recognized engineering practice and approved by the Department of Engineering of the City of Los Angeles in all respects.

Affiant further states that it is not true that this defendant's real property described in Paragraph IV of plaintiffs' Complaint in Equity, [71] or any of the real property described in plaintiffs' Complaint in Equity as the "critical area" or the "community area" has for many years been zoned or classified as lands adapted to residential use only. It is true that in the year 1920 the City of Los Angeles adopted Ordinance No. 33761, which provided by its terms that all property not then other-

wise in use should be used for residential property unless an exception was granted. But said Ordinance did not prohibit the granting of exceptions for the conduct of rock and gravel operations upon said lands. And in the year 1934 an exception was granted from the provisions of Ordinance 33761, authorizing affiant to use the property on which he now operates his commercial rock, sand and gravel processing plant from the provisions of said Ordinance; that said Ordinance No. 33761 is generally known and described as the Status Quo Ordinance, which remained in effect until such time as the City of Los Angeles adopted a comprehensive zoning plan covering the real property located in the San Fernando Valley area; that no comprehensive zoning plan including the property described in plaintiffs' Complaint in Equity as a "critical area" or the "community area" was ever adopted in the City of Los Angeles until the enactment of Ordinance 90,500, which became effective June 2, 1946.

That prior to the adoption of Ordinance 90,500 the Department of City Planning determined that the real property included in the critical area should be zoned as in Zone M-3, where unlimited industrial use is permitted, and for almost two years the said property described as a "critical area" was included on tentative maps relating to the proposed comprehensive zoning ordinance as property to be zoned in Zone M-3. But immediately before the adoption of Ordinance 90,500 the Department of Planning decided that the best interests of the community would be served if the property was not zoned M-3,

which would allow unlimited and varied uses, but as a substitute therefor a procedure was adopted known as the Conditional Use Permit, whereby the land in the critical area could be devoted to its best use, namely the development of its natural resources by the production of rock, sand and gravel, under such terms and conditions [72] as would safeguard the public in general and pursuant thereto Section 12.24 of the Los Angeles Municipal Code was adopted as a part of Ordinance 90,500.

That on June 2, 1946, and pursuant to the provisions of Section 12.24 of the Los Angeles Municipal Code, affiant filed an application with the City Planning Commission of the City of Los Angeles requesting that a Conditional Use Permit be issued to him authorizing him to use the real property owned by him and described as in Paragraph IV of plaintiffs' Complaint in Equity, for the purpose of mining of rock, sand and gravel.

That thereafter and pursuant to the procedure prescribed by Section 12.32 C of the Los Angeles Municipal Code, the City Planning Commission caused the application for said Conditional Use Permit to be set for public hearing on August 20, 1946. Said matter came on for hearing before said Commission on August 20, 1946, and at said time approximately 400 people attended said hearing. Your affiant and those who opposed the granting of the application were given approximately the same amount of time in order to present their respective cases. Said hearing consumed in excess of three hours.

At that meeting Wm. R. Woodruff, an Associate Planner for the Planning Commission of the City of Los Angeles, filed an instrument in writing entitled "Report to the Director of Planning, the City Planning Commission and the Zoning Administrator, City Plan Case No. 962, John D. Gregg," and read said report in its entirety to the Planning Commission. A copy of said report is attached hereto, marked Exhibit "B" and made a part hereof. Said report provided among other things as follows:

"The applicant has a modern rock crusher plant located in the M-3 zone on Tujunga Avenue near Bradley Avenue. This plant is modern in all respects and is very free from dust usually associated with rock crushers. This plant has been in operation many years and with the exception of a small acreage adjacent to Glenoaks Boulevard the property now zoned for rock crusher purposes has been exhausted. The pit has an average depth of approximately 100 feet, with the top 40 feet being of exceptionally high quality material and the lower 60 feet of a lesser desirable material, but still acceptable by the trade to meet their specifications, provided the same is mixed with the top 40 feet. If this conditional use is approved by the Commission applicant proposes to excavate the property involved to the same depth (approximately 100 feet) and will move the material thus excavated to the existing plant by belt conveyors which will be tunneled under Glenoaks Boulevard at Peoria Street to serve the area lying between Peoria and Wicks Street and across Glenoaks Boulevard approxi-

mately 150 feet southeasterly to serve the area between Peoria and Pendleton Streets. An application is now pending before the Board of Public Works for the installation of these conveyors across the public streets involved. It is understood that the Board of Public Works will communicate their recommendation in this regard to the Planning Commission in the near future. The applicant states that their present intent for the development of the property will be by an electric shovel rather than the common steam shovel type and the principal machinery will be a primary rock crusher located in the pit not closer than 250 to 300 feet from any boundary. This primary crusher must be located within the pit since the conveyor belt is only designed to handle rocks up to a 7 inch diameter. This primary crusher is so designed that the gravel and smaller rocks fall through [74] steel spacing bars onto the conveyor belt and the larger rocks fall into a hopper which feeds the primary crusher. This crusher creates a certain amount of noise which was not audible from the adjoining bank adjacent to Glenoaks Boulevard. It might be desirable if this application is granted to reserve the right to require soundproofing or directional baffle plating if the noise from the same becomes objectionable to surrounding private ownerships."

Thereafter said Planning Commission of the City of Los Angeles denied the application to your affiant whereupon your applicant pursuant to the procedure prescribed in Section 12.24 Subsection C of

the Los Angeles Municipal Code, filed his appeal with the City Council from the decision of the City Planning Commission.

Thereafter said City Council caused the appeal of your affiant to be referred to its City Planning Committee and said City Planning Committee, pursuant to the provisions of Section 12.32 E of the Los Angeles Municipal Code, caused the same to be set for public hearing on September 27, 1946, and on said date a public hearing was held. The applicant and those opposing the granting of the appeal were given an equal amount of time to present their respective cases. Said hearing consumed approximately three hours. At said hearing approximately 250 persons were present. At said hearing the City Planning Committee had before it the complete file of the City Planning Commission and in addition thereto received additional evidence, both oral and documentary. After said hearing City Planning Committee voted unanimously to recommend to the City Council that the appeal of affiant be granted, and on October 2, 1946, said Planning Committee made its report to the City Council. A copy of the excerpts from the minutes of the City Council of the City of Los Angeles of its meeting held October 2, 1946, is attached hereto, marked Exhibit "C" and made a part hereof.

That on October 2, 1946, at or about 10:30 a.m. the matter of the Planning Committee report came on for hearing before the City Council. At that time it was announced that certain persons were in the council room who [75] would like to be heard upon

the matter. The President of the City Council announced that if there were no objections the usual twenty minutes would be allotted to each side with ten minutes for rebuttal to the applicant. The matter proceeded to hearing and both sides were allotted approximately twenty minutes. However, the Council consumed in excess of two hours at said hearing, the most of the two hours was consumed by discussions between the several councilmen on certain motions and the Council calling witnesses on its own behalf.

At the conclusion of said hearing a motion to adopt the report of the Planning Committee granting the appeal of John D. Gregg on the conditions in said report, was adopted, by a vote of eleven ayes and two noes.

At said hearing before the City Council the said Council had before it the complete file of the City Planning Commission and its Planning Committee, and prior to said hearing all of the members of the Planning Committee of the City Council, three in number, and several other councilmen, viewed the premises involved in the application.

Said permit was granted on the following conditions:

1. That the applicant construct a 6-foot cyclone type mesh wire fence around the said property, including barbed wire on the top of said fence providing the Fire Department grants permission for same.

2. That no permanent plant building or structure be installed or maintained on said property and that all material excavated be mined by an electrically powered shovel and primary crusher and transported by a conveyor belt system running through a tunnel or tunnels under Glenoaks Boulevard to the plant now owned and operated by applicant, lying southwesterly of said Boulevard and processed at said plant.
3. That a setback line of fifty feet from all property lines and existing streets be maintained and that slopes of excavations be maintained at one foot to one foot.
4. That the area between all property lines or street line and 50 foot setback be screen planted progressively as excavated.

Your affiant states that he has: [76]

1. Caused a 6-foot cyclone type wire mesh fence to be placed around the said property and that he has obtained permission from the Fire Department of the City of Los Angeles to cause a barbed wire strand to be placed on the top of said 6-foot cyclone type fence, and at date hereof he has actually and substantially fenced the property, and has expended a large sum of money so as to properly install said fence.
2. Agreed that he will not permit a permanent plant building or structure to be installed or maintained on said property and that all material excavated shall be mined by an electri-

cally powered shovel, which shovel has been actually purchased at a cost of about \$100,000, and after the materials are crushed by a primary crusher, the same will be transported by a conveyor belt system running through a tunnel or tunnels under Glenoaks Boulevard to the plant now owned and operated by applicant, lying southwesterly of said Glenoaks Boulevard and processed at said plant, which tunnel and conveyor, has been installed at great cost.

3. Arranged to maintain a setback line of fifty feet from all existing property lines and existing streets, and slopes of excavations will be maintained at one foot of horizontal to one foot of vertical incline.
4. Arranged so that the area between property lines and street lines and the 50 foot setback which he will maintain will be screen planted progressively as excavations proceed.

That affiant for approximately fifteen years last past has operated the rock, sand and gravel excavation and processing business lying southerly of Glenoaks Boulevard and adjacent to the property described in plaintiffs' Complaint in Equity: that a portion of the property described in plaintiffs' Complaint in Equity and included in the said Conditional Use Permit, to-wit, a strip of property approximately 150 feet deep lying southerly of Glenoaks Boulevard, is now being excavated by affiant pursuant to the terms of said Conditional Use Permit; that affiant's plant has a daily capacity of

about 5,000 tons of material and that affiant has exhausted by excavation all of the material lying within the area wherein operations have been conducted under the variance granted to affiant in 1934 excepting those portions thereof which [77] are occupied by affiant's processing plant and stockpiles which it is necessary to maintain and that the only source of supply in the vicinity and available to affiant is the real property upon which plaintiffs seek to enjoin commercial production of rock, sand and gravel; that subsequent to the granting of said Conditional Use Permit affiant proceeded to and did cause a tunnel to be placed under Glenoaks Boulevard at the corner of Peoria Street pursuant to the terms of said Conditional Use Permit and pursuant to the terms of the permit issued to affiant by the Board of Public Works of the City of Los Angeles; that affiant has expended large sums of money installing said tunnel and installing therein machinery for the operation of a conveyor belt to convey materials through said tunnel and to affiant's processing plant; that subsequent to the issuance of said Conditional Use Permit and in reliance thereon affiant purchased and paid for a 6-yard electric shovel at a cost of approximately \$100,000, and that the same has now been installed on said property; that in anticipation of the continued operation of said property affiant has expended several hundred thousand dollars for equipment and construction costs so as to extend such operations on to the so-called permit area lying northerly of Glenoaks Boulevard.

That subsequent to the issuance to affiant of said Conditional Use Permit and on or about the 22nd day of November, 1946 certain persons alleging to be owners of property in the vicinity covered by said permit filed an action in the Superior Court of the State of California in and for the County of Los Angeles entitled Jackson Earl Wheeler, et al, Plaintiffs vs. J. D. Gregg, et al, Defendants, and being numbered in the office of the Clerk of said Superior Court No. 522031.

That said Complaint is substantially identical with the Complaint in Equity filed by the plaintiffs in this proceeding and was prepared, filed and served by the same attorney who represents the plaintiffs in this proceeding; that said Complaint in that action alleges that the Complaint is brought on behalf of all persons owning property in the vicinity of plaintiffs' property and that both of said actions present identical issues.:

That upon the filing of said action in the said Superior Court those [78] plaintiffs sought a temporary restraining order and preliminary injunction enjoining affiant from conducting any operations for the production of rock, sand and gravel on real property owned by affiant; that after hearing on notice in open Court, Honorable Henry M. Willis, Judge of the Superior Court, dissolved the Temporary Restraining Order and denied the Preliminary Injunction; that thereafter said action was set for trial in Department 15 of the Superior Court of Los Angeles County before Honorable Alfred L. Bartlett, Judge Presiding, and that said

trial commenced on the 28th day of May, 1947 and continued almost daily (with slight interruptions caused by the illness of the Court or counsel) until the judgment was entered therein on or about September 10, 1947; that said judgment denied plaintiffs any relief whatsoever excepting that the judgment by its terms required that the future operations of affiant be conditioned upon certain conditions therein set forth, and that said conditions set forth in said judgment have been and will be complied with;

That a true copy of the Complaint, Answer, Findings, Judgment and Notice of Appeal in said Superior Court Action No. 522031 are hereto attached marked Exhibit "D"; that each and all of said Findings of Fact are true and are made a part of this affidavit as though herein set out in full as the statements of this affiant; that said action is still pending on appeal and has not been determined.

That affiant is informed and believes and therefore alleges the fact to be that the real parties in interest in Superior Court Case No. 522031 and the real parties in interest in the within action No. 7765-PH are one and the same and that both of said actions have been and now are being prosecuted for the benefit of the same persons.

Affiant's only suitable source of materials for processing in his plant now consists of the property described in the Complaint in Equity herein as the "critical area"; that after the entry of judgment in the said Superior Court case, affiant commenced operations for the excavation of rock, sand

and gravel in that portion of the critical area lying southerly of Glenoaks Boulevard and also continued operations for the installation of equipment in that portion of said "critical area" lying northerly of Glenoaks Boulevard with the view of [79] conveying materials therefrom to affiant's plant by conveyor belt through the tunnel theretofore installed under Glenoaks Boulevard pursuant to the terms of said Conditional Use Permit; that affiant has spent large sums of money in said operation.

That if a Preliminary Injunction is granted in the within action, affiant will be unable to proceed with the production of rock, sand and gravel from the area therein involved and will therefore be required to shut down all operations in affiant's processing plant, and if affiant should prevail at a trial of the within action, affiant will have suffered great and irreparable damage in that it will then be necessary for affiant to spend considerable money in rehabilitating said processing plant and reactivating the same as well as the employment of entirely new crews of men.

That affiant has approximately 97 employees regularly employed in the operation of said plant and that affiant's monthly payroll aggregate approximately \$31,000; that affiant's production from said plant is approximately 5,000 tons a day and that the gross sales from said plant approximate in excess of \$120,000 a month; that affiant regularly employs from 30 to 40 independent truck operators in connection with the operation of said plant with a monthly truck payroll ranging from \$10,000 to \$20,000.

That affiant has approximately fifty rock, sand and gravel dealers who are entirely dependent upon affiant's plant for their supply of rock, sand and gravel, all of which are critical items in connection with the construction of homes, highways and other works; that affiant's plant produces approximately 30% to 35% of all the rock, sand and gravel which is produced in the San Fernando Valley and that there are no other plant facilities in said area capable of replacing affiant's production if affiant's plant is shut down; that the next nearest source of supply which would be available for use in the area now served by the San Fernando Valley is the San Gabriel Cone and that the additional cost of transporting rock, sand and gravel into the San Fernando Valley from the San Gabriel Cone in order to replace the shortage caused by shutting down affiant's plant would be from 50c to \$1.00 a ton additional cost; that said additional cost would have the effect of increasing substantially the [80] price of aggregates now produced from the San Fernando Cone because of the increased "base price" so that the aggregate increased cost of such materials to consumers in the said area might aggregate several million dollars per year, all of which would greatly increase the price of construction work in the area.

That Consolidated Rock Products Company operates a rock plant immediately adjacent to affiant's plant and has a contract with the City of Los Angeles to furnish to the City of Los Angeles all of its requirements for rock, sand and gravel and

particularly all of its requirements of such materials at the City's hot asphalt plant located near Roscoe; that affiant has contracted with Consolidated Rock Products Company to underwrite and furnish up to one-half of such requirements; that such requirements of the City of Los Angeles range from 10,000 to 30,000 tons of materials per month and that if affiant is enjoined, as aforesaid, Consolidated Rock Products Company, because of its limited production of certain sizes of rock, would be unable to furnish the City with all of its said requirements if Consolidated were thus deprived of the said underwriting of said contract by affiant.

That if affiant is compelled to cease operations of his said plant it would be necessary to discharge some 97 employees in addition to the said independent truck operators because the discontinuance of operations at said plant would destroy all source of income to affiant from said plant and affiant would be unable to continue the heavy payroll expense; that affiant would be forced to pay heavy "standby" charges for taxes, connected electrical horsepower, insurance, maintenance, upkeep and other fixed charges, the amount of which it is difficult to estimate; that by reason of said charges together with loss of all income affiant would suffer a minimum loss of at least \$5,000 a day during the period of said plant is shut down; that affiant has entered into contracts for the purchase of and has purchased and paid for conveyor belts, conveyors, equipment, electrical shovel and other equipment for the operation of said property at a cost

of several hundred thousand dollars, all of which would be useless to affiant except for salvage purposes if said plant or property were shut down.

That in order to allow affiant to continue the operation of his rock crushing plant lying southerly of Glenoaks Boulevard and thus avoid the [81] heavy loss and damage hereinabove averred, it is essential that affiant be allowed to continue his excavation operations not only southerly of Glenoaks Boulevard but also in that portion of the so-called "critical area" lying immediately northerly and adjacent to Glenoaks Boulevard at the point where affiant has already installed a tunnel and conveyor system and has already moved in the 6-yard shovel hereinabove mentioned for the following reasons:

That affiant is already excavating in the northerly 150 feet of Lot 12, which is immediately southerly of Glenoaks Boulevard and which is included in the so-called "critical area" or "permit area"; that as is hereinabove alleged said 150 foot strip is the only property southerly of Glenoaks Boulevard from which affiant can remove material excepting the area occupied by the rock crushing plant and stockpiles; that under the terms of affiant's Conditional Use Permit affiant must leave a 50 foot berm or setback from the southerly line of Glenoaks Boulevard and must slope the excavated bank one foot horizontal to one foot vertical; that Glenoaks Boulevard is now 40 feet in width and after allowing for the widening of Glenoaks

Boulevard to 100 feet and allowing for the 50 foot setback from that point and a one to one slope, there remains in said Lot 12 a total of only 151,410 tons of material as of November 18, 1947, and that said material is being consumed at the rate of approximately 5,000 tons a day so that as of December 8, 1947, which is the date set for hearing of the Order to Show Cause in re Preliminary Injunction herein, there will remain in said Lot 12 only 81,410 tons of material which will supply the rock crushing plant for a period of only three weeks and one day, and that when said material has been excavated it will be necessary to shut said plant down unless material from northerly of Glenoaks Boulevard is then available; that in order to have material from northerly of Glenoaks Boulevard available at the end of said period, it is necessary that a "surge pile" of material be accumulated at the southerly end of the conveyor belt system from when said material is transferred to another conveyor belt system for transportation to said plant; that said "surge pile" can only be accumulated by material excavated northerly of Glenoaks Boulevard and thence transported on the conveyor belt system through the tunnel under Glenoaks Boulevard to the southerly end of said belt [82] where it is deposited; that said "surge pile" cannot be operated until a considerable tonnage of material has been deposited thereon, to-wit, approximately 166,400 tons of material, and that it will take about six weeks to accumulate said "surge pile" in a sufficient quantity to permit its

operation in connection with the rock plant; hence if affiant is not allowed to excavate immediately northerly of Glenoaks Boulevard, he will have no "surge pile" available at the time that the available material southerly of Glenoaks Boulevard is exhausted, which will be in approximately three weeks and one day from December 8, 1947; hence if affiant is not allowed to immediately operate northerly of Glenoaks Boulevard, his plant will be shut down for lack of material at the end of said period of time.

That none of the plaintiffs named in the above action can be injured in any manner whatsoever by operations conducted by affiant northerly of Glenoaks Boulevard at the intersection of Peoria Street, which is the point where the conveyor belt tunnel and 6-yard shovel is now situated for the following reasons:

The location of the residences of the named plaintiffs is set forth in Paragraph XX of plaintiffs' Complaint in Equity herein and there is attached to said Complaint a map of the area in question; a reference to the allegations of said Paragraph and to said map discloses that those plaintiffs who it is alleged live on Allegheny Street reside more than one-half mile away from the point of the operations northerly of Glenoaks Boulevard at the intersection of Peoria Street; and that those plaintiffs who it is alleged live on Sunland Boulevard and Stonehurst Boulevard and Art Street and Fenway Avenue reside even a greater distance

away from said operation; and that those defendants who it is alleged reside on Wicks Avenue are located approximately 1,500 or more feet away from said operation; that said map reveals an area colored in yellow and entitled "Unrestricted Area," and that nearly all of said area is a rock, sand and gravel operation conducted by the Consolidated Rock Products Company; that said map discloses that some of the plaintiffs who live on Wicks Avenue reside within a few hundred feet or less of said Consolidated Rock Products Company property, whereas they are many times that far distant from the proposed operations of [83] affiant northerly of Glenoaks Boulevard at the intersection of Peoria Street; that many of said plaintiffs have for many years last past lived immediately adjacent to or in the vicinity of rock, sand and gravel operations and that most of said plaintiffs have purchased their said properties long since operations for the excavations of rock, sand and gravel were commenced in said area; that said area including the so-called "critical area" has long been generally known to be rock and gravel producing land; that the distance from affiant's operations at the northerly intersection of Peoria Street and Glenoaks Boulevard to the properties of plaintiffs is in most cases substantially the same as the distance from the operations which have long been conducted southerly of Glenoaks Boulevard and that the progress of excavation operations northerly of Glenoaks Boulevard during the pendency of this action will not be such

as to substantially change such relative distances; hence affiant alleges that the continuance of operations northerly of Glenoaks Boulevard during the pendency of this action can cause no substantial damage to any of said plaintiffs.

That other rock crushing plants and rock and gravel excavations have been and now are operated within the city limits of the City of Los Angeles much more closely situated to places of human habitation and residential districts than the property of defendant Gregg in this action, and with respect to many of said rock plants and rock and gravel excavations there are numerous residences and places of habitation nearby and within a few feet of such rock plants and excavations, and that some of said rock plants and excavations are substantially surrounded by closely built up residential districts; that in and about the vicinity of Roscoe are public parks and playgrounds which have been established by the City of Los Angeles adjacent to operating rock plants and excavations; that Fernangeles Playground, which is located at the corner of Laurel Canyon Boulevard and Wicks Street is situated within approximately 400 feet of the plant and excavation now being operated by Granite Materials Company; that immediately adjacent to said plant of Granite Materials Company and within 200 feet thereof there is located a residential district consisting of between 75 and 100 dwellings, [84] all of which have been built since said plant has been operating and within the past

nine months; that the Roscoe Park and Playground is situated immediately adjacent to the plant and excavation of Blue Diamond Corporation and is separated from said plant and excavation by a roadway not more than 40 feet wide and that said park and playground was established in said location by the City of Los Angeles many years subsequent to the commencement of operations by Blue Diamond Corporation and its predecessors on said property; that immediately adjacent to said Blue Diamond Corporation property are located dwelling houses which are separated from said operation by a roadway not more than 40 feet in width; that immediately adjoining the rock and gravel excavation located at the intersection of Victory and Vineland Boulevards, there is a residential district located within 50 feet of the said excavation and extending from that point westerly for several blocks and that said residential district has been established within the last six months and since said pit was excavated; that the City of Los Angeles within the last year has constructed and is now maintaining and operating the Fair Avenue public grammar school located within 400 feet of said Victory and Vineland excavation; that in the City of Arcadia the Blue Diamond Corporation is presently operating a rock and gravel plant and that immediately adjacent thereto is a residential district consisting of over 225 houses which have been built within the past year and that said residences are located within 200 feet

of said rock operation; that with respect to said Granite Materials Company plant hereinabove referred to, there is at this time a new residential development comprising approximately 256 houses being constructed within approximately 1,500 feet of said rock plant; that the operation of said rock plants, as hereinabove set forth, and the excavations at the locations hereinabove mentioned has not destroyed or depreciated or substantially affected the value of the adjoining properties for residential use, all as is evidenced by the facts hereinabove set forth.

That for many years last past there has existed a rock and gravel excavation on Pendleton Street which was made by the City of Los Angeles [85] in connection with the construction of the Hollywood Dam and that said excavation is closer to the properties of many of the plaintiffs herein than the operation of defendant John D. Gregg; that there is now and for many years last past have been maintained by the City of Burbank and by the City of Los Angeles on Pendleton Avenue two dumps wherein there is daily deposited large amounts of rubbish, trash and refuse some of which is burned therein causing large clouds of smoke to arise daily and that one of said dumps is located within the said so-called "community area" and the other of said dumps is located immediately adjacent thereto.

That the commercial operation upon said property by affiant for the production of rock, sand

and gravel does not as a matter of law, constitute a nuisance per se, and cannot as appears from this affidavit and the aerial map of the property involved, which map is attached hereto, marked Exhibit "A," and made a part hereof, constitute a nuisance in fact.

That said aerial map was flown June 6, 1946, and prior to the time that the said Conditional Use Permit was granted to affiant and that said map was presented to the Planning Committee of the Los Angeles City Council as a part of the Exhibits presented at the said hearing. That outlined in red upon said map is the property which is included within the said Conditional Use Permit and from said aerial map it is evident that said property is within the ancient water course of the east branch of the Tujunga Wash and is in fact rock land.

That attached hereto marked Exhibits "A-1" and "A-2" and made a part hereof are two aerial maps which were flown on or about the 19th day of November, 1947, and that said maps show the operations being currently conducted as above described [86] by affiant in that portion of the critical or permit area lying southerly of Glenoaks Boulevard and likewise the installations of equipment and shovel which had been made northerly of Glenoaks Boulevard at the intersection of Peoria Street; that from said maps it would appear evident that if affiant be enjoined from operations

northerly of Glenoaks Boulevard, that his source of material southerly of Glenoaks Boulevard now zoned for excavation under Conditional Use Permit will be completely exhausted within three weeks from December 8, 1947, as hereinabove alleged, and that there is no other property lying southerly of Glenoaks Boulevard which is available for excavation. Said maps also show that portion of affiant's property lying southerly of Glenoaks Boulevard which is now occupied by existing plant facilities and stockpiles and which is therefore not available for excavating purposes.

That there is also attached hereto marked Exhibit "A-3" a diagram drawn to scale showing the present excavation operations of defendant southerly of Glenoaks Boulevard and showing the limited amount of material remaining available for excavation, all as hereinabove set forth.

That the area outlined in red on the map attached to plaintiffs' Complaint in Equity does not constitute a true, or any "community area"; that said line is an arbitrary line which has been purposely selected by plaintiffs for the purpose of excluding therefrom existing industrial and rock, sand and gravel operations; that if, as alleged in plaintiffs' Complaint, an area of 3,000 feet from the outer boundaries of all sides of the so-called "critical area" were included in the so-called "community area," said area would include the present rock operations of John D. Gregg and of Consolidated Rock Products Company and of the Arrow Rock

Company and would also include at least one hot asphalt plant, the Burbank City Dump and another private dump; that over a period of years in and immediately adjacent to said so-called "community area" there have been granted by the City Council of the City of Los Angeles numerous exceptions and variances authorizing many uses other than residential, such as rock plants, hot asphalt plants, slaughter houses, stables, riding academies, a winery and distillery (which is located immediately adjoining the so-called "critical area") and other non-residential uses; that the land designated in the [87] Complaint in Equity as the "critical area," which is the land in connection with which the said Conditional Use Permit was granted, is situated in the ancient water course of the east branch of the Tujunga Wash and prior to the construction of Hansen Dam said land was periodically inundated as a result of which a deposit of rock, sand and gravel approximately 100 feet in depth and comprising most of said area has been accumulated and deposited by the action of said water in connection with said inundation over a long period of years; that the character of said land because of the rock and sand content of the ground, the irregular contours and gulleys crossing the same, is unsuitable for use for any purpose except for the production of rock, sand and gravel; that with the exception of three or four small residences which were required by defendant and have since been removed, no attempt has ever been made to

apt any of said lands to residential, agricultural or other use and that said land has lain idle in its original state up to and including the present time;

That said land has no substantial value for residential or agricultural purposes for the reasons aforesaid but that said land has a very high and very substantial value to defendant for the production of rock, sand and gravel; that rock, sand and gravel can be produced only from property where it has been deposited by the action of nature and that if defendant were prohibited from removing said material the value of all of said land to defendant or to anyone else would be substantially destroyed;

That it is not true that the conduct of the City Council of the City of Los Angeles in granting said Conditional Use Permit was either arbitrary or unreasonable or unfair or in excess of the limits of their authority but that on the contrary the resolution of said City Council granting said Conditional Use Permit was adopted only after thorough consideration of the matter and after a public hearing before the Planning Committee of the City Council and a second public hearing, although not required by law, before the City Council as a whole, at which hearings the protestants were given an opportunity to be fully heard and that said City Council at the time of the adoption of said resolution had before it the recommendation of its Planning Committee and all documentary

evidence which had been introduced by both affiant and the protestants at the hearings [88] before the Planning Commission of the City of Los Angeles and the Planning Committee of said City Council and that said act was and is within the power and authority given and granted to the City Council by the terms and provisions of Ordinance No. 90,500 of the City of Los Angeles, a copy of which is attached to plaintiffs' Complaint in Equity herein.

That by reason of the foregoing affiant respectfully submits that no Preliminary Injunction shall issue and if the Court should determine to issue a Preliminary Injunction in the within action that the bond to be furnished by plaintiffs in that regard should be not less than \$500,000.00.

JOHN D. GREGG.

Subscribed and sworn to before me this 28th day of November, 1947.

/s/ D. J. DUNNE,

Notary Public in and for said County and State.

EXHIBIT B

REPORT

Report to the Director of Planning, the City Planning Commission and the Zoning Administrator

City Plan Case No. 962. John D. Gregg

Property Involved: Approximately 100 acres lying southeasterly of Glenoaks Boulevard between Wicks and Pendleton Streets.

Request: For the approval of a conditional use for the excavation of rock, sand and gravel and the installation and operation of such machinery as is necessary incidental thereto.

Findings: The property involved has a frontage of approximately 1800 feet on the southeasterly side of Wicks Street commencing approximately 900 feet from Glenoaks Boulevard, 2700 feet on the northeasterly side of Peoria Street, 2100 feet on the southeasterly side, excluding two 5-acre parcels, one on the northeasterly side being Lot 20 which has been acquired by the applicant and one on the southeasterly side being Lot 3 occupied by a winery and located 600 feet northeasterly of Glenoaks Boulevard, approximately 600 feet on the northeasterly side of Pendleton Street backing up to the winery and the adjoining 5-acre parcel to the northeast. This latter frontage is approximately 300 feet southwesterly of a hill running in an easterly and westerly direction and 600 feet from Glenoaks Boulevard. There is also a 150-foot parcel on the northwesterly side of Glenoaks Boule-

vard and on the southeasterly side of Peoria Street which connects to the present M-3 zone and adjoins the present operation of the applicant. All of the property involved is in the R-A zone including a 150-foot strip on the northwesterly side of Glenoaks Boulevard adjacent to the above mentioned M-3 zone.

The property is vacant with the exception of a few houses owned by the applicant on Peoria Street near Glenoaks Boulevard. There are single family residences on commercial acres along Wicks Street across from the property and the Park Department also has a development on this street adjacent to Dronfield Avenue which is the westerly boundary of the Stonehourst Subdivision, which lies north-easterly of the property involved and extends to [94] Clybourn and Stonehourst Avenues. On the south-easterly side of Pendleton Street there is a large excavation made by the Water Department in securing materials for one of the dams. There is also a combustible rubbish dump operated for the City of Burbank utilizing a portion of the Glenoaks Boulevard side of the pit which was granted as a war variance primarily as a salvage yard and which has now degenerated to a junk yard which does not even use good engineering principles in the filling of the hole and is apparently in violation of the variance grant.

At the time the field investigation of this property was being made a representative from the City Engineer's Office was present for a short time and a discussion ensued regarding a storm drain ease-

ment in the proximity of Lots 13 and 14, fronting Pendleton Street, which is to be used for the drainage of Hansen Canyon through which Sunland Boulevard traverses. There are natural channels crossing Lots 13 and 14 and it is the City Engineer's plan to create an alignment from the present outlet of the water course near Stonehourst and Clybourn Avenues and empty the same into the pit owned by the Water Department on the opposite side of Pendleton Street from the applicant's property.

The applicant has a modern rock crusher plant located in the M-3 zone on Tujunga Avenue near Bradley Avenue. This plant is modern in all respects and is very free from dust usually associated with rock crushers. This plant has been in operation many years and with the exception of a small acreage adjacent to Glenoaks Boulevard the property now zoned for rock crusher purposes has been exhausted. The pit has an average depth of approximately 100 feet, with the top 40 feet being of exceptionally high quality material and the lower 60 feet of a lesser desirable material, but still acceptable by the trade to meet their specifications, provided the same is mixed with the top 40 feet. If this conditional use is approved by the Commission applicant proposes to excavate the property involved to the same depth (approximately 100 feet) and will move the material thus excavated to the existing plant by belt conveyors which will be tunneled under Glenoaks Boulevard at Peoria [95] Street to serve the area lying between Peoria and Wicks Street and across Glenoaks Boulevard approxi-

mately 150 feet southeasterly to serve the area between Peoria and Pendleton Streets. An application is now pending before the Board of Public Works for the installation of these conveyors across the public streets involved. It is understood that the Board of Public Works will communicate their recommendations in this regard to the Planning Commission in the near future. The applicant states that their present intent for the development of the property will be by an electric shovel rather than the common steam shovel type and the principal machinery will be a primary rock crusher located in the pit not closer than 250 to 300 feet from any boundary. This primary crusher must be located within the pit since the conveyor belt is only designed to handle rocks up to a 7-inch diameter. This primary crusher is so designed that the gravel and smaller rocks fall through steel spacing bars on to the conveyor belt and the larger rocks fall into a hopper which feeds the primary crusher. This crusher creates a certain amount of noise which was not audible from the adjoining bank adjacent to Glenoaks Boulevard. It might be desirable if this application is granted to reserve the right to require soundproofing or directional baffle plating if the noise from the same becomes objectionable to surrounding private ownerships.

All of the streets involved on which the property fronts are only 40 feet in width with the exception of Dronfield Avenue which is 30 feet in width having been dedicated on an ultimate 60-foot width by the adjoining subdivider. Wicks, Peoria and Pendleton Streets are all planned as ultimate 60-foot

streets with Glenoaks Boulevard as a 100-foot street. The applicant proposes to set back 50 feet from the ultimate width of these streets and a one to one slope measured from the 50-foot width will be observed in digging the pit which will not exceed 100 feet in depth. This setback and slope ratio, together with the ultimate width, is satisfactory to the City Engineer's Office.

If this application is approved a substantial chain link [96] fence should be installed completely surrounding the property and including the existing pit where the present operations are being conducted. If the applicant so desire the fence could be progressively installed surrounding the property being worked.

Since, if this application is approved, the property will be removed forever from any possibility of subdivision due to the creation of an extremely deep pit that in all possibility will not be filled in this present generation, adequate protection should be given to the adjoining private property owners and an arrangement made whereby if the property is subdivided at a future date the adjoining dedication from the property involved should be assured. This should include all of the property around the periphery and around the islands created.

In the past huge stock piles amounting to small hills have been created on the surface adjacent to public streets and allowed to accumulate for many years. The applicant states that at the present time there is a demand for all types of materials

excavated from the pit, with the exception of a very fine powder which will be refilled into the existing pit. Similar restrictions should also be imposed if this application is granted for the back filling of stock piles that accumulate beyond a reasonable expected usage.

The applicant, in a previous report, submitted to the Commission and to the Director-Manager, brings out the fact that there will be an acute shortage of available rock and sand from the San Fernando Cone which consists of the deposits brought down by the Big and Little Tujunga Wash through geological ages. They also point out that a survey of probable future requirements indicate the anticipated demand to rise to 14 million tons per annum within 18 months and 22 million tons within 12 months later. The present production is approximately 8 million tons with a maximum production of 10 million tons annually during the boom of middle 20's. The report also brings out the fact that there is not now zoned sufficient available material to meet this anticipated demand without developing other areas extending into Ventura and San Bernardino Counties [97] which would materially increase the ton cost basis on the ton mile that the material must be transported. Aerial maps will be available showing all of the workings in the San Fernando Valley.

The Associate, as far as he could ascertain, could not find any agency that had made a survey of the rock and gravel deposits in this vicinity and it seemed to be the common sense of opinion of the

agencies contacted that no survey had been made since it was taken for granted that ample material in this area was available. In this respect the Associate contacted the following agencies who reported that they have made no survey and could give no suggestions as to where such a survey might be found:

1. Regional Planning Commission.
2. The County Flood Control (some information might be available from a study of the appraisals made at the time the property for the Hansen Dam was purchased for the Federal Government).
3. The State Highway Department.
4. United States Engineers.
5. City Maintenance Department.
6. City Engineer.
7. State Bureau of Mines.

If this application is approved there is no question that similar applications will be submitted by other rock and gravel interests and in all probability a precedent will be established that will make it very difficult to deny such applications, particularly in the area lying northeasterly of San Fernando Road in which area this application is located. To date no solution has been attained for any ultimate development of the property thus despoiled by the removal of material and the creation of an unfillable pit, except for the operation of a non-combustible and combustible rubbish pit either privately or publicly operated which will [98] not replace the tangle value of the property or

any blighting affects created on surrounding properties. Against this picture should be weighed the good created for the majority of the property owners within the City through the means of maintaining the present rock, sand and gravel prices at such time as a shortage results through the using up of the available material in the areas now zoned for rock and gravel production.

No recommendation is being submitted since it is felt that this is a policy matter which should be decided on its merits by the Commission and for their guidance if the application is approved, the following conditions are suggested:

1. Drainage Easements. That satisfactory easements be provided for any existing water course influencing or affecting the property at the request of the Board of Public Works or City Engineer (partially contained in letter to Commission from Board of Public Works).

2. Conveyors. That all requirements needed by the Board of Public Works or City Engineer regarding the crossing of public streets with conveyors present or future, be imposed. (Contained in letter to Commission from Board of Public Works.)

3. Street Dedication. That by acceptance of this conditional use and the utilization of the property for the purpose hereby permitted the applicant and any future owners, heirs or assigns agree, as follows:

(a) To furnish the owners share of easements for street purposes, without cost to the City

for the ultimate widening of Wicks Street, Peoria Street, Pendleton Street and Dronfield Avenue on a 60-foot basis and Glenoaks Boulevard on a 100-foot basis and the owners share of any necessary boundary streets. Said easements to be furnished at such time as requested by the City Council.

4. Distance of Pit From Boundary. That no excavations be made within 50 feet of any exterior boundary of the property involved or from the ultimate street line of any existing street.

5. Slope Ratio. That a minimum of a one to one slope incline ratio be maintained for the sides of any excavation made, measured from [99] the above mentioned 50-foot setback with the maximum depth of the pit limited to 100 feet.

6. Machinery and Location Primary Crusher. That all crushing of rock and grading of rock, sand and gravel, be performed in the existing plant located in the M-3 zone southwesterly of Glenoaks Boulevard with the exception of a primary crusher used for crushing rock into suitable sizes to fit conveyor belts, said primary crusher to be located at least 250 feet from any exterior boundary of the property and be so shielded that the noise from the same will not be materially objectionable to the occupants of surrounding property.

7. Removal of Material. That all materials to be processed be removed from the pit by conveyors and dug by electric shovels.

8. Reduction of Dust. That reasonable care be maintained at all times to reduce the dust created

in the excavation work to a minimum so as not to be a nuisance to occupants of adjoining property.

9. Disposal of Waste Material and Stock Piles.

That all waste material be back filled into the pit created and all material stores in stock piles on the premises be below street level.

10. Permission for Inspection. That authorization be furnished the proper City Authorities for periodic inspection of the property in connection with the enforcement of the conditions imposed.

11. Fencing. That all portions of the property which is excavated and the existing pit on the applicant's adjoining property be fenced with a substantial chain link fence at least 7 feet in height. Said fencing may be delayed if such material is not now available until such time as same does become available and may be progressively installed prior to excavations being made if so desired.

12. Hours of operation?

WM. R. WOODRUFF,

City Planning Associate.

WRW:EQ

June 25, 1946. [100]

This is to certify that the foregoing instrument of seven pages is a true and correct copy of the report of William R. Woodruff, City Planning Associate, filed in City Plan Case 962 of the application of John D. Gregg for conditional permit.

/s/ EDITH S. JAMESON,

Secretary, City Planning Commission of City of
Los Angeles. [101]

No. 11861

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. D. GREGG,

Appellant,

vs.

HENRY WALLACE WINCHESTER, ERNEST
JOSEPH STEWART, et al.,

Appellees.

Transcript of Record
In Two Volumes
VOLUME II
Pages 313 to 634

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED
MAY 11 1948

PAUL P. O'BRIEN

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Upon Appeal from the District Court of the United States
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EXHIBIT C

Excerpts from Minutes of the Council of the City of Los Angeles Meeting held October 2, 1946 (Vol. 321, Pages 374-376, incl. File No. 24473)

The Planning Committee reported as follows:

In the matter of communication from the City Planning Commission relative to appeal of John D. Gregg from the decision of said Commission in denying his application for conditional use for the excavation of rock, sand and gravel on real property in the San Fernando Valley bounded generally by Wicks Street, Dronfield Avenue and its southerly extension, Pendleton Street and Glenoaks Boulevard, more particularly described in said application, as amended, of said communicant to the said Commission and known as City Plan Case No. 962.

In accordance with provisions of the zoning ordinance, your Committee conducted a public hearing on this matter whereat proponents and opponents of the question were heard and although a considerable number of protests were filed, after careful consideration of all the facts presented and a study of same, it is our opinion that the said use should be permitted.

We therefore recommend in accordance with the requirements of the zoning ordinance that the Council make the following written findings of fact:

The Council finds that the findings of the City Planning Commission on which said Commission's

decision was based denying this application were in error for the following reasons:

1. That the property involved is situated in a district, the character of which is unsuited for residential purposes.
2. That the land in question is composed of gravel beds and is primarily suitable only for production of sand, rock and gravel.
3. That the proposed use of this property is deemed essential to the public convenience and welfare and is in harmony [102] with the various elements or objectives of the master plan.
4. That under the conditions to be imposed the proposed use would not be detrimental to surrounding developments and would not adversely affect individual property rights or interfere with the enjoyment of property rights of property owners in the vicinity or affect any legal right of such property owners.
5. While there are about 450 acres of rock bearing land in M-3 zones in the area only 23,000,000 tons are available to existing plant facilities and this amount is not sufficient to meet public and private demand for rock aggregates.

We further find from the foregoing reasons that the public necessity, convenience, and general welfare require that this appeal be granted and the conditional use be permitted as requested subject to the following conditions:

1. That the applicant construct a 6-foot cyclone type mesh wire fence around the said property, including barbed wire on the top of said fence providing the Fire Department grants permission for same.
2. That no permanent plant building or structure be installed or maintained on said property and that all material excavated be mined by an electrically powered shovel and primary crusher and transported by a conveyor belt system running through a tunnel or tunnels under Glenoaks Boulevard to the plant now owned and operated by applicant, lying southwesterly of said Boulevard and processed at said plant.
3. That a setback line of fifty feet from all property lines and existing streets be maintained and that slopes of excavations be maintained at one foot to one foot.
4. That the area between all property lines or street line and 50 foot setback be screen planted progressively as excavations proceed.

We Further Recommend that permission be granted to said applicant to make such excavations in Glenoaks Boulevard as may be [103] necessary to install and house the necessary conveyor belts, such excavations to be made in accordance with specifications of and at the location approved by the Board of Public Works.

Mr. Rasmussen moved, seconded by Mr. Henry, that said report as read be adopted.

Mr. Warburton moved, seconded by Mr. Rasmussen, that twenty minutes be allotted to each side to present their case.

Which motion was adopted by a unanimous vote.

Thereupon Mr. John D. Gregg, appellant, addressed the Council and made a statement as to past operations of his company, and of the demand for rock and gravel at the present time.

Mr. Jakson Wheeler, home owner and representing other property owners, thereupon addressed the Council in opposition to granting the application.

Mr. Paul McMahon of the Board of Education and Mr. George Hjelts of the Playground and Recreation Department; addressed the Council speaking in opposition to granting the permit owing to hazardous conditions that will be created.

Mr. Davis then moved, seconded by Mr. Warburton, that Mr. H. P. Cortelyou, Director of the Bureau of Maintenance and Sanitation, be requested to attend the Council session and speak upon the question.

Which motion was adopted by a unanimous vote.

While awaiting Mr. Cortelyou's attendance at the Council session, Mr. Henry moved, seconded by Mr. Rasmussen, that ten minutes be allotted to the appellant for rebuttal.

Which motion was adopted by a unanimous vote.

Whereupon, Mr. Clyde Harrell, representing the appellant, and Mr. Robert Mitchell, President of the Consolidated Rock Products Company, again reiterated the necessity of granting the application.

Mr. Cortelyou then being present in the Council Chamber, addressed the Council stating that anything he might say was his [104] own opinion as an individual and as Director of the Bureau of Maintenance and Sanitation and that he was not appearing in behalf of, or by authority of, the Board of Public Works.

Mr. Cortelyou stated that if there is not a sufficient supply of aggregate in the San Fernando Valley available for use upon City work, it would be necessary to secure same from greater distances, which would necessarily increase the length of haul and undoubtedly increase the cost to the City.

Mr. Warburton then moved, seconded by Mr. Rasmussen, that further consideration of the matter be continued until the meeting of the Council to be held December 3, 1946, and in the meantime the City Engineer be instructed to make a survey of available supplies of rock and sand deposits in the San Fernando Valley and report thereon to the City Council.

Upon calling the roll the members voted as follows: Ayes—Messrs. Holland, Warburton and President Moore (3); Noes—Messrs. Austin, Bennett, Christensen, Cronk, Davenport, Davies, Harby, Henry, Rasmussen and Timberlake (10).

The President declared the motion to continue failed of adoption, and instructed the Clerk to call the roll on the adoption of the report of the Committee, and upon calling the roll the members voted as follows: Ayes—Messrs. Austin, Bennett, Cronk,

Davenport, Davies, Harby, Henry, Holland, Rasmussen, Timberlake and President Moore (11); Noes—Messrs. Christensen and Warburton (2).

The President declared the committee report adopted. [105]

Certification

State of California,
County of Los Angeles—ss.

I, Walter C. Peterson, City Clerk of the City of Los Angeles and ex-officio Clerk of the City Council of the City of Los Angeles, do hereby certify and attest the foregoing to be a full, true and correct copy of the original excerpt from the minutes of the Council of the City of Los Angeles at its meeting held October 2, 1946 (File No. 24473), on file in my office, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of the City of Los Angeles this 6th day of December, 1946.

WALTER C. PETERSON,
City Clerk of the City of
Los Angeles,

By /s/ A. M. MORRIS,
Deputy. [106]

EXHIBIT D

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 522031

JACKSON EARL WHEELER, PATRICK
ADAMS, W. L. CALLEY, D. H. CALLEY,
ARCHIE I. WAY, LILLIAN LEWIS, W. R.
SHADLEY, C. T. WINKLER, DONALD
KERSEY, CHARLES WISE, WILLIAM F.
BORROWE, T. O. EASLEY, R. E. BER-
TELL, BETSY ROSS, GEORGE J. KING,
FRANK E. WRIGHT, B. R. FONDREN,
ROBERT D. HOPKINS, FRANK LUTI-
ZETTI, DWIGHT MOORE, LOUISE R.
TAYLOR, FRANK J. SMYTHE, C. C.
CAMPBELL, HELEN CHURCHWARD,
PAUL C. BROWN and WEST COAST
WINERY, INC., a corporation,

Plaintiffs,

vs.

J. D. GREGG, and the CITY OF LOS ANGELES,
a municipal corporation,

Defendants.

Oliver O. Clark and Robert A. Smith, 818 Gar-
field Building, Los Angeles 14, California, Trinity
9457, Attorneys for Plaintiffs.

COMPLAINT IN EQUITY FOR INJUNCTION,
AND DAMAGES FOR TORTIOUS CONDUCT

Plaintiffs complain and allege:

I.

That said defendant City of Los Angeles, is, and

at all times herein mentioned, was, a municipal corporation organized and existing as such under a municipal charter.

That said defendant John D. Gregg is the owner and in possession of that certain real property, comprising about one hundred and fifteen acres situated in the City of Los Angeles, County of Los Angeles, State of California, described as follows, to wit: [107]

Lots 1, 2, 4, 5, 6, 7, 13 and 14 in Block 19; and Easterly 150 feet of Lot 12 in Block 8; Lots 4 to 9, inclusive, and Lots 15 to 19, inclusive, and Lots 21 and 22, and the Easterly 280 feet of Lot 14, in Block 17; of the Los Angeles Land and Water Company's subdivision of a part of the Maclay Rancho as per map recorded in Book 3 of Maps at Pages 17 and 18 in the Office of the County Recorder of Los Angeles County, California.

That said land, colored in red and designated as the "Critical Area," is shown upon a map marked Exhibit "A" which is hereunto attached and made a part hereof. That said land is hereinafter referred to as the "Critical Area."

II.

That said map is a substantially correct representation of the area covered thereby upon a scale of one inch to each one thousand lineal feet thereof. That the area upon said map which is enclosed within a red line, which line is not more than about

three thousand feet from the various extremities of said "critical" area, and upon the westerly side thereof, follows the easterly boundary of an area shaded in yellow which is designated as an "Unrestricted Area," is herein referred to as the "Community" area, said "Community" area being about one and one-half square miles. The entire area shown upon said map is herein referred to as the "Map" area. That as a convenience in folding, the top of said map as attached hereto is west.

That each of the areas confined by narrow parallel lines and designated as a named street upon said map, is, and for more than five years continuously last past, has been, a public highway regularly dedicated, improved, and used as such. That said public highways which are shaded in green upon said map, are, and for more than five years continuously last past, have been, improved with a concrete pavement. That said paved highways within said "Community" area are [108] seven and eighty-four hundredths miles in length, and the improved highways within said area are five and one-half miles in length.

That the area shaded in green and designated as a "Community Park" upon said map, contains fifteen acres of land, and is, and ever since 1928, has been, a public park, improved and maintained as such by the Park Department, and under the management of the Playground Commission, of said defendant City of Los Angeles, and extensively used as such by the inhabitants of the area shown upon said map.

That the area shaded in green and designated as a "School" upon said map, contains about four acres, and is, and continuously since during the year 1942, has been, a public kindergarten and elementary grade school, improved and maintained as such by the Board of Education of said defendant City of Los Angeles, and used as such by the pupils of kindergarten and elementary grade age residing in said community.

That the areas shaded in green upon said map, and designated, respectively, as "Community Chapel" and "Community Church," which church is on the Sunland Boulevard, are, and for more than one year continuously last past, have been, owned, improved, and used, as places of public worship for the residents of said "Community" area, and the area shaded in green, marked "Community Church," and which lies between said "School" and said "Park," upon said map, is, and for more than six months last past, has been, under improvement as a place for public worship.

That the area lying westerly of Randall Street, and southerly of the southerly line of said "Community" area, which line parallels Glenoaks Boulevard, is, and ever since about February, 1933, has been, zoned as an "M-3" district.

That said defendant John D. Gregg began during, or about, the year 1934, and subsequent thereto has accomplished, the excavation of rock, sand and gravel upon about thirty-five acres of a sixty-two acres tract of land, owned by him, and lying within said M-3 zone and distant about three hundred feet

southerly from said Glenoaks Boulevard, and immediately southerly of [109] the boundary of said "Community" area as it passes that portion of said "Critical" area which extends southerly from Glenoaks Boulevard. That said defendant maintains upon said land, machinery, equipment, and other facilities, for the excavation of such materials and the processing thereof for market.

That all of the areas shaded in black upon said map, are, and on October 2, 1946, were, and most of them have been for more than five years continuously last past, improved, occupied, and used, as family homes for human residents. That said homes number three hundred and fifty nine within said "community" area, and nine hundred and ninety two within the area covered by said map.

That the lands shaded in yellow and designated as an "Unrestricted" area upon said map, and the easterly boundary of which is the westerly boundary of said "Community" area, lie within the natural channel of an ancient water course commonly known as the east brand of the "Tujunga Wash," and are, and always have been, unrestricted as to their use for the commercial production of rock, sand and gravel.

III.

That during the year 1907 the Los Angeles Land and Water Company, a California corporation, hereinafter referred to as the "Land Company," was the owner and in possession of a tract of land comprising about three thousand acres, which included the land lying within said "Community"

area, and the lands lying within said "Unrestricted" area, and other lands adjacent to said areas.

That during said year, and while the owner of said lands, said land company caused said lands to be surveyed and classified in respect of their natural adaptability for residential, horticultural, and agricultural development and use, and for the commercial production of rock, sand, and gravel.

That in and by said survey and classification said land company classified the lands lying within said "Unrestricted" area [110] as naturally adapted to the commercial production of rock, sand, and gravel, and classified the remainder of its lands, including the lands situated within said "Community" area as naturally adapted to residential, horticultural, and agricultural, development and use.

That the commercial production of rock, sand, and gravel, was then, at all time since has been, and now is, the highest, best, and most valuable, use to which said lands so classified for such use, as aforesaid, were adapted, for the reasons that said lands lie within the natural channel of said ancient water course; are constituted of rock, sand, and gravel of commercial quality and in commercial quantity, which materials are overlaid with a very thin structure of unproductive soil, or are altogether exposed, and that a pit excavated thereon for the production of said materials is susceptible to refilling by the discharge of water, rock, sand, and gravel, which occurs annually in the upper reaches of said water course.

That the residential, horticultural, and agricultural, development and use of said lands, including

all of the lands within said "Community" area, so classified for such use, as aforesaid, then was, at all times since has been, and now is, the highest, best, and most valuable, use to which said lands are adapted, for the reasons that said lands do not lie in the natural channel of any water course; are overlaid with a stratum, several feet thick, of rich sandy loam; are upon a gently sloping plane with a slightly undulating surface, and are within an area of moderate climatic changes, and of climatic conditions favorable for human residence and for plant growth.

That there are now, and for more than one year continuously last past there has been, more than 1650 persons residing within said "Community" area, and more than 7500 persons residing within said "Map" area. That 218 of the 1650 persons residing within said "Community" area, now are, and on October 2, 1946, were, children between the ages of four years and thirteen years and 110 of said 1650 persons are, and on said date were, children between the ages [111] of twelve years and seventeen years.

IV.

That thereafter, during the year 1914, said land company executed a contract for the sale to Fernando Valley Development Company, a corporation, of about twenty-two hundred acres of said land, including the lands within said "Community" area, so classified as best adapted to residential, horticultural, and agricultural development and use, as

aforesaid, and thereupon, and during said year, said corporations caused to be prepared, executed, and recorded in the office of the County Recorder of Los Angeles County, California, a declaration in writing, by which the commercial production of rock, sand, and gravel, within or upon said lands so classified as best adapted to residential, agricultural, and horticultural development and use, was prohibited for a period of twenty years thence next ensuing. That said restrictions remained in full force and effect throughout said twenty-year period.

V.

That on or about the 16th day of February, 1916, said defendant City enacted its Ordinance Number 33,761, whereby it adopted and declared a plan for the zoning of all real property within its corporate limits, and classified all land not otherwise zoned, whether then within the corporate limits of said city, or thereafter annexed thereto, as adapted to residential development and use, and prohibited operations for the commercial production of rock, sand, and gravel, upon such lands. That said zoning ordinance number 33,761 remained in force and effect until superceded by Ordinance Number 74,142 enacted by said defendant City, and which became effective on October 27, 1934.

That thereafter, to wit, on the 11th day of April, 1918, the lands which comprise said "Map" area, and a large body of other lands adjacent thereto on all sides, were annexed to said defendant city.

That the zoning provisions of said zoning ordinance number 33,761 prohibited the conduct of operations for the commercial production of rock, sand, and gravel, within and upon the lands which comprise said "Community" area, between the date of said annexation, to wit, April 11, 1918, and the effective date of said superceding zoning ordinance Number 74,140, to wit, October 27, 1934.

That thereafter, to wit, on or about September 26, 1934, said defendant city adopted its Zoning Ordinance Number 74,140, which ordinance became effective on October 27, 1934, and which by its terms provided that it superceded said Zoning Ordinance Number 33,761, of February 16, 1916, and all amendments thereto, and variances granted thereunder.

That said Ordinance Number 74,140, of October 27, 1934, as aforesaid, classified the lands which comprise said "Community" area, as adapted to residential development and use, and prohibited the conduct of any operation within or upon said lands for the commercial production of rock, sand, and gravel. That said ordinance remained in force and effect until superceded by Ordinance Number 90,500 enacted by said defendant city on March 7, 1946, and which became effective on June 1, 1946.

VI.

That C. S. Smith and Wm. Evans made written application to said Planning Commission for a variance permit to conduct operations for the commercial production of rock, sand, and gravel, upon lots

9 and 10, in block 22, within said "Community" area. That said application was denied by said Planning Commission, by the unanimous votes of its members, on August 24, 1934.

That thereafter Claire Schweitzer made written application to said Planning Commission for a variance permit to conduct operations for the commercial production of rock, sand, and gravel upon lots 5, 6, 7, 13, and 14, in block 19, within said "Community" area. That said application was denied by said Planning Commission, by the [113] unanimous votes of its members, on July 7, 1936. That an appeal was taken by said applicant, from said denial, to the City Council of said defendant city, and upon September 18, 1936, said appeal was denied by said City Council. That the land as to which said variance permit was sought, comprises about twenty-five acres and lies in about the center of said "Critical" area.

That thereafter H. I. Miller made written application to said Planning Commission for a variance permit to conduct operations for the commercial production of rock, sand, and gravel upon lots 9 and 10 in block 22, within said "Community" area. That said application was denied by said Planning Commission, by the unanimous votes of its members, on August 5, 1936.

That thereafter Ray Schweitzer made written application to said Planning Commission for a variance permit to conduct operations for the commercial production of rock, sand, and gravel, upon lots 5, 6, 7, 13, and 14, in block 19, within said

“Community” area. That the land as to which said variance permit was sought, comprises about twenty-five acres and lies in about the center of said “Critical” area. That said application was denied by said Planning Commission by the unanimous votes of its members, on July 7, 1939. That an appeal was taken by said applicant, from said denial, to the City Council of said defendant city, and upon September 25, 1939, said appeal was denied by said City Council.

That thereafter said defendant John D. Gregg made written application to said Planning Commission for a variance permit to conduct operations for the commercial production of rock, sand, and gravel upon lots 12 and 24 in block 18, within said “Community” area. That said application was denied by said Planning Commission, by the unanimous votes of its members, on January 25, 1940. That said lot 12 of the land as to which said variance permit was then denied, is that part of said “Critical” area which lies southerly of Glenoaks Boulevard.

That thereafter F. H. Haines made written application to [114] said Planning Commission for a variance permit to conduct operations for the commercial production of rock, sand, and gravel, upon lot 7, in block 20, within said “Community” area. That said application was denied by said Planning Commission by the unanimous votes of its members on March 11, 1941.

That thereafter Sam and Pauline Katz made written application to said Planning Commission

for a variance permit to operate a riding academy upon a parcel of land 170 feet wide and 470 feet deep, at number 9821 Stonehurst Avenue, at the junction of said avenue with Art Street, within said "Community" area, and that said application was denied by said Planning Commission by the unanimous votes of its members, on November 26, 1945.

VII.

That during, or about, the year 1928, residents within said "Community" area, and in territory adjacent thereto, petitioned the Park Commission of said defendant city, that an election be called for the purpose of voting upon a proposition to issue bonds as a lien upon the real property within said area, to secure money with which to purchase land within said "Community" area, and to improve the same as a public recreation and assembly center. That thereupon said election was called and held, and said bond issue was approved, and the bonds thus authorized were issued and sold.

That thereupon the area which contains about fifteen acres, and which is shaded in green and designated "Community Park," upon said map, and which lies immediately across a forty foot street from said "Critical" area, was purchased by said Park Commission, and was improved with landscaping and plantings; outdoor recreational facilities, and an Administration and Community Club House building, fully furnished. That said building, last named, was erected in 1931, and today it would cost about \$50,000 to duplicate. That the cost

of said land and improvements was in excess of \$50,000 and they could not be duplicated now for less than, and are reasonably worth, [115] \$100,000. That the monies obtained from said bond issue, together with other monies available to said Park Commission were used for the purchase and improvement of said property.

That a substantial part of the principal sum of said bonds is unpaid. That said unpaid balance will mature in installments, annually, during the twelve years next ensuing, and constitutes a lien upon all of the real property within said "Community" area including the lands owned by each of the plaintiffs named herein, and the numerous other persons within said area, similarly situated, on whose behalf and for whose benefit this action is begun and maintained.

That at the time when the residents of said "Community" area petitioned for said election, and voted for said bonds, as aforesaid, they knew, and the facts were, that the land holdings of said land company had been surveyed, classified, and restricted, as aforesaid, and that said defendant city, by the enactment of its zoning ordinance, as aforesaid, had prohibited any extension within said "Community" area, of any operation for the commercial production of rock, sand, and gravel, within said area, as aforesaid, and that lands within said "Community" area had been sold, and were being sold, upon and subject to said restrictions and zoning which prohibited the conduct thereon of any operation for the commercial production of rock,

sand, and gravel, as aforesaid, and that said "Community" area was being developed and used as a residential area, in reliance, upon said restrictions and prohibitions.

That at the time of the making of said petition, and the voting of said issue of bonds, said residents of said "Community" area understood and believed, by reason of the matters herein alleged, that said "Community" area would continue to be developed and used as a residential area within which operations for the commercial production of rock, sand, and gravel, would be prohibited, and had it not been for such understanding and belief said petition would not have been made, and said bonds would not have been voted. [116]

That the recreational facilities established, as aforesaid, have been maintained constantly since their inception, and are now maintained, under the management and supervision of the Playground Commission of said defendant city, and they always have been, and are, extensively patronized and used by the residents of said "Community" area, and of the territory adjacent thereto, including numerous children of kindergarten and elementary grade school ages. That the attendance upon said facilities by said residents during the year last past has been, and now is, from a minimum of 110 to a maximum of 800 persons each day, and from a minimum of 1000 to a maximum of 2000 persons each week.

VIII.

That for many years prior to the year 1942, and until abandoned during that year, as herein alleged, the Los Angeles City Board of Education maintained and conducted a public kindergarten, and elementary grade school, commonly known and referred to as the Remsen Avenue School, on Remsen Avenue, now Glenoaks Boulevard, at the northeast corner of its junction with Truesdale Avenue, adjacent to said "Unrestricted" area. That the site of said school prior to its abandonment, as herein alleged, is shown upon said map as a hatched area designated as "Abandoned School."

That during the year 1942, residents of the area, including said "Community" area, whose children attended said Remsen Avenue School, requested said Board of Education to abandon said Remsen Avenue School because of its proximity to prospective permissible operations for the commercial production of rock, sand, and gravel, and the hazards to said pupils incident to such operations, including the excavation and maintenance of deep pits dangerously attractive to children of kindergarten and elementary grade school age; the heavy trucking traffic, and the noise and dust incident to such production and trucking operations, and to establish a new kindergarten and elementary grade school within said "Community" area, as a replacement for [117] said abandoned school. That prior to the abandonment of said Remsen Avenue School, as herein set forth, there was no public school located within said "Community" area.

That at the time when said request was made it was known to the residents of said area who made said request, and to a very large number of other residents of said "Community" area who were interested in the maintenance of safe school conditions for the children of kindergarten and elementary grade school age who resided in said "Community" area, and to the members of said Los Angeles City Board of Education, and the facts were, that continuously for more than twenty-eight years immediately theretofore, the owners and subdividers of the lands lying within said "Community" area, and, subsequent to the annexation of said area to said defendant city in 1918, the Planning Commission; the Playground Commission; the Board of Education, and the City Council of said defendant City of Los Angeles, had declared and maintained, as aforesaid, a policy of prohibiting within said "Community" area, any extension of operations for the commercial production of rock, sand, and gravel, and of encouraging by said policy of restriction, the development of said "Community" area as a residential district wherein the children residing within said area could attend upon and use the facilities of any school; churches; recreational park, and roadways leading thereto, established and maintained in said "Community" area, as herein set forth, with a minimum risk of dangers incident to heavy trucking traffic upon the highways, and the proximity of deep and dangerous pits excavated in the commercial production of rock, sand, and gravel, and attractive to children of kinder-

garten and elementary school grade ages, and the dust, dirt, and noises, which customarily and inevitably resulted, and result from such operations.

That at the time of said request, the residents within the area served by said Remsen Avenue School, which included the residents of said "Community" area, and the Board of Education; the Planning [118] Commission; the Park Commission; the Playground Commission; and the City Council, of said defendant City of Los Angeles, knew, and the fact was, that the establishment and maintenance of places frequented by the public, including schools; playgrounds; churches; assembly halls, and highways, in a vicinity wherein deep and extensive pits were excavated, and other operations were conducted, in the commercial production of rock, sand, and gravel, was extremely inadvisable because human experience taught that such operations in such a community, had theretofore constituted, and then constituted, and would continue to constitute, a very serious hazard to the safety, well being, and comfort, of the residents of such a community, and particularly to children of kindergarten, and elementary grade school, age, to whom the presence of such conditions was prejudiciously attractive, and was prejudicial to the general public welfare, health, and safety.

That upon receiving said request for the abandonment of said Remsen Avenue School, and the establishment of a kindergarten and elementary grade school within said "Community" area, for the reasons herein stated, said Board of Education

informed said defendant City of Los Angeles of said request, and of the reasons therefor as herein stated, and inquired of said defendant as to the permanency of its policy to prohibit any extension within said "Community" area, of operations for the commercial production of rock, sand, and gravel, which policy was evidenced by said zoning law enacted in 1916, and by said city's denial of said six applications for variance permits in 1934; 1936; 1939; 1940, and 1941, respectively, as hereinbefore set forth, and was informed by said defendant city, that it was the permanent policy of said city to prohibit within said "Community" area, and to exclude therefrom, any extension of any operation for the commercial production of rock, sand, and gravel, and to encourage the development and use of said "Community" area for residential purposes.

That said Board of Education, and the residents of the area served by said Remsen Avenue School, including the residents of said "Community" area, believed the representations of said defendant City of Los Angeles, made as aforesaid, and relied thereupon, and, in such belief and reliance, and for the reasons herein stated, and not otherwise, said Remsen Avenue School was abandoned in 1942, and, during said year, a new school, known as the "Stonehurst" School, was constructed and placed in use upon land, comprising about four acres, then purchased for that purpose, by said Board of Education, within said "Community" area. That the land so purchased, improved, and used for said school, is shown upon said map by a green shading

designated as "School." That said school is within six hundred feet of said "Critical" area.

That said school opened in 1942 with an enrollment of 221 pupils of kindergarten, and elementary grade age. That the number of pupils enrolled in said school has constantly increased, and the present enrollment thereat is 418.

IX.

That during the years 1945 and 1946, said defendant City of Los Angeles, made an extensive resurvey and study of its master plan of zoning the area within its municipal boundaries, including the area involved herein, lying in what is commonly known and referred to as the San Fernando Valley.

That upon the conclusion of said resurvey and study, said defendant city, acting through its agencies as prescribed by law, including its Planning Commission; Engineering Department, City Council, and Mayor, determined, and concluded, that the general public welfare; health; safety; comfort, and convenience, and the welfare; health; safety; comfort, and convenience, of the residents within said "Community" area, justified and required a continuance of said zoning restriction upon any extension within said "Community" area, of any operation for the commercial production of rock, sand, and gravel, [120] and thereupon, and on March 7, 1946, said defendant city enacted its Ordinance No. 90,500 wherein and whereby the zoning restrictions then upon said "Community" area were restated and continued, and any extension of any operation

for the production of rock, sand, and gravel, within said "Community" area, was prohibited, unless thereafter it should be shown to the satisfaction of said defendant city, that such use was then essential or desirable to the public convenience or welfare, and was then in harmony with the various elements and objectives of the Master Plan of Zoning as adopted by said city, and a variance permit for such an operation should be first obtained from said defendant city. That said zoning ordinance became effective on June 1, 1946, and is, and at all times since its effective date, as aforesaid, has been, in full force and effect.

X.

That under, and by reason of, the encouragement derived from the natural adaptability of the land lying within said "Community" area, to residential development and use, and the restrictions imposed thereon and maintained, by private restriction and governmental zoning, as aforesaid, against any extension within said "Community" area of any operation for the commercial production of rock, sand, and gravel, said "Community" area developed by steady and substantial growth and improvement up to October 2, 1946, into, and on said date it was, a predominately and substantial residential community, embracing within its area of about one and one-half square miles, more than 360 homes of a reasonable value in excess of \$2,500,000; more than 1500 residents including more than 328 children over four, and under sixteen, years of age; public

kindergarten and elementary grade school facilities of a reasonable value in excess of \$50,000; public recreational and park facilities of a reasonable value in excess of \$100,000; church facilities of a reasonable value in excess of \$25,000; an American Legion Hall; a well equipped medical clinic; nearly eight miles of concrete paved highways; adequate water, gas, [121] and electrical service, and reasonable motor transportation.

XI.

That during the fifteen years immediately preceding October 2, 1946, in contemplation of its residential development and use, restricted and zoned, as aforesaid, as its highest and most valuable use, the market value of land within said "Community" area, increased from about five hundred dollars per acre, to about five thousand dollars per acre, and the assessed valuation of said lands, for public taxation, was progressively and substantially increased, and during the year 1946, and prior to the application of said John D. Gregg for a variance permit, as herein alleged, the assessed valuation of said lands for public taxation, was increased by twenty-five per cent to one hundred and twenty-five per cent of its then assessed valuation for taxation.

XII.

That during, or about, the month of September, 1941, said defendant John D. Gregg became the president and active manager of said Los Angeles

Land and Water Company, and ever since said date he has held, and now holds, said offices.

That plaintiffs are informed and believe, and therefore allege, that said defendant John D. Gregg at the time when he succeeded to the office of president of said land company, as aforesaid, was, and ever since has been, and now is, the owner of a substantial interest in said land company.

That plaintiffs are informed and believe, and therefore allege, that at the time when said defendant John D. Gregg acquired his said interest in said land company, he knew that the land lying within said "Community" area had been originally owned; classified, and restricted as to its use, by said land company, and had been zoned by said defendant city, as herein alleged, and that the major part thereof had been sold by said land company for residential, horticultural, and agricultural, development and use, and had been, [122] and was devoted to such use.

XIII.

That during a period of about five years immediately last past, said defendant John D. Gregg acquired by purchase, in several separate parcels and at several different times, the land which comprises about one hundred and fifteen acres, and constitutes said "Critical" area within the heart of said "Community" area, as shown upon said map.

That at the time when said defendant John D. Gregg purchased each of said parcels of land which

now constitute said "Critical" area, as aforesaid, said defendant knew that said land had been classified in 1914 by said land company, as best adapted to residential, horticultural and agricultural development and use, as herein alleged, and he knew that said land had been restricted as to its use, by said land company, and by said zoning ordinances enacted by said defendant city prior to the year 1946, as herein alleged, and he knew that each of said six applications to said defendant city for a variance permit to conduct operations for the commercial production of rock, sand, and gravel, within said "Community" area had been made, and that three of said applications involved lands purchased by him and situated within said "Critical" area, as aforesaid, and that said applications had been denied, as herein alleged, and he knew that other applications for variance permits to erect improvements and conduct operations that were not of a residential nature, as set forth in paragraph sixth hereof, had been made, and denied by said defendant city, as hereinbefore alleged.

That at the time when said defendant John D. Gregg purchased said lands, as aforesaid, he also knew, and the facts were, that within said "Community" area a substantial and progressive community of homes; schools; churches, and public parks, recreation facilities, and other places of public assembly, had been developed and was maintained, as herein alleged, in reliance upon said restrictions, and the permanency [123] of the zoning

which prohibited any extension within said area of operations for the commercial production of rock, sand, and gravel, as herein alleged, and that in such reliance said community of homes had been provided, with reasonable adequacy, at great public and private expense, as herein alleged, with about eight miles of paved highways; kindergarten, and elementary grade school facilities; with church facilities; with community recreational and park facilities; with an American Legion Hall; with a Medical Clinic; with motor transportaton; with water, gas, and electrical service, and with fire protection, and that in consequence of said restrictions and zoning, and of said development and use, of said lands, the intrinsic value, and the market value, and the assessed value for purposes of taxation, of lands within said "Community" area, had substantially appreciated, as herein alleged, and that said lands were in substantial demand for residential development and use.

That plaintiffs are informed and believe, and therefore allege, that at the time when he purchased said lands, said John D. Gregg intended upon the completion thereof to apply to said city for a variance permit to enable him to excavate said lands for the commercial production of rock, sand, and gravel, and that in his purchase of said lands, as aforesaid, said John D. Gregg did not contract therefor in his own name, but secretly contracted therefor in the names of dummies acting for him,

and that he concealed from the vendors of said lands at the times of such purchases, his intention to apply for a variance permit under said zoning laws to enable him to conduct operations thereon for the commercial production of rock, sand, and gravel, and actively encouraged said vendors to believe that said purchases were being made for the purpose of developing and using said lands for residential purposes. That no one of said vendors would have sold his said land, as aforesaid, if he had known that the purchase thereof was actually for the benefit of said John D. Gregg, and that he intended to apply for said variance permit, as aforesaid. [124]

XIV.

That at the time when said defendant John D. Gregg purchased said lands which comprise said "Critical" area, as aforesaid, said defendant knew, and the facts then were; ever since have been, and now are, that any substantial operation upon said land within said "Critical" area for the commercial production of rock, sand, and gravel, would create, and constitute, a very substantial, serious, and dangerous, hazard and detriment to the general public welfare, health, and safety of the community within said "Community" area, and to the inhabitants of said community, and would substantially and materially interfere with, interrupt, disturb, and impair, the use, and comfortable enjoyment, of their respective properties within said "Community"

area, by the owners, and by the inhabitants, of said properties, respectively, and would substantially depreciate the intrinsic value, and the reasonable market value, of all of the lands lying within said "Community" area, and would create a reasonable apprehension that such operations would eventually result in a substantial erosion of the highways abutting upon said "Critical" area, and of the lands abutting upon said highways immediately opposite said "Critical" area, and that such operations would be prejudicial to the general public welfare, and conveniences, and would not be in harmony with the various elements, or objectives, of the Master Plan of Zoning as adopted by said defendant city.

XV.

That subsequent to the purchase by said defendant John D. Gregg, of said parcels of land which now comprise said "Critical" area, as aforesaid, and subsequent to the enactment of said zoning ordinance by said defendant city in March, 1946, said defendant John D. Gregg, notwithstanding his knowledge of facts and events as herein alleged, applied to the Planning Commission of said defendant city, for a variance permit to conduct operations for the commercial production of rock, sand, and gravel, from and upon said lands purchased and owned by him, as aforesaid, and which comprise said "Critical" area.

That in support of his said application, said defendant John D. Gregg represented to said City of

Los Angeles, that the property constituting said "Critical" area and as to which said defendant John D. Gregg then sought said variance permit, was situated in a district the character of which was unsuited for residential purposes; that said land was composed of gravel beds, and was primarily suitable only for production of rock, sand, and gravel; that his proposed use of said property was essential to the public convenience and welfare, and was in harmony with the various elements or objectives of the master plan of zoning as enacted by said defendant city, as herein alleged; that his proposed use of said lands would not be detrimental to the developments surrounding the lands as to which said variance permit was sought, and would not adversely affect individual property rights, or interfere with the enjoyment of property rights of property owners in the vicinity of said "Critical" area, or affect any legal rights of such property owners; that while there were about 310 acres of rock bearing land in M-3 zones in the San Fernando Valley area, only 23,000,000 tons were available to existing plant facilities, and that this amount was not sufficient to meet public and private demands for rock aggregates, and that, therefore, the public necessity, convenience, and general welfare, required that said permit be granted.

XVI.

That at the time when said representations were made by said defendant John D. Gregg, as aforesaid, each of said representations was false and un-

true, and said defendant John D. Gregg then well knew that each of said representations was false and untrue.

That at the time when said application was made by said defendant John D. Gregg, it was a fact, and a matter of public record, that since the year 1935, twenty children who had been attracted to the gravel pits created in said San Fernando Valley by the commercial production of rock, sand, and gravel, had accidentally lost their [126] lives in said pits, and that more than fifty children, similarly attracted, had sustained serious injuries, accidentally, in said pits.

That said facts were of such common knowledge in said San Fernando Valley at the time when said application was made, that it is a reasonable inference that said John D. Gregg well knew thereof.

XVII.

That thereafter, to wit, on August 20, 1946, after a public hearing; an inspection of the property, and a thorough consideration of all the facts presented, the Planning Commission of said defendant city, by the unanimous vote of its members, denied said application, and contrary to representations of John D. Gregg, stated that it found that the property as to which said variance permit was sought, could be utilized for residential purposes as evidenced by the residential development in the immediate neighborhood of said land; that the then

existing zoning which prohibited the commercial production of rock, sand, and gravel, from or upon the lands as to which said permits was sought, was an appropriate zoning for said property and for the general area in which said property was situated; that the proposed use of said lands would interfere with a reasonable enjoyment by a substantial number of property owners in that vicinity, of their homes and community facilities; that the extensive excavations and pits which would be left after operations had been completed for the commercial production of rock, sand, and gravel, upon and from said lands as to which said variance permit was sought, would create an unsightly and dangerous condition which would be detrimental to the public welfare, and particularly to the public safety, and would leave said land in a condition unsuited for any use in keeping with other properties in said community, and that to permit an extension of such operations upon the property as to which said variance permit was requested, would not serve any public convenience, and would adversely affect individual property rights in that community, and would interfere with the normal growth of said community, and would conflict with the objectives of the Master Plan of Zoning as incorporated in said [127] zoning ordinances enacted by said defendant city, as herein stated.

XVIII.

That thereafter said defendant John D. Gregg appealed to the City Council of said defendant city,

from said denial by said City Planning Commission of his said application, and thereafter, to wit, on October 2, 1946, said City Council granted said application.

That said grant of said application was made upon the following conditions, to wit:

1. That the applicant construct a 6-foot cyclone type mesh wire fence around the said property, including barbed wire on the top of said fence providing the Fire Department grants permission for same.

2. That no permanent plant building or structure be installed or maintained on said property and that all material excavated be mined by an electrically powered shovel and primary crusher and transported by a conveyor belt system running through a tunnel or tunnels under Glenoaks Boulevard to the plant now owned and operated by applicant, lying southwesterly of said Boulevard and processed at said plant.

3. That a setback line of fifty feet from all property lines and existing streets be maintained and that slopes of excavations be maintained at one foot to one foot.

4. That the area between all property lines or street lines and 50 foot setback be screen planted progressively as excavations proceed.

XIX.

That said granting of said application was accomplished by the affirmative vote of eleven members of said City Council who, within the eight months immediately preceding said grant, had voted for the adoption of said zoning ordinance No. 90,500 on March 7, 1946, [128] and, who, thereby had found and determined, upon an exhaustive re-survey and study of zonal planning in the San Fernando Valley, that the conditions and developments within said "Community" area justified and required for the promotion of the public welfare; the preservation of public health and safety, and the protection of property rights, that any extension of operations for the commercial production of rock, sand, and gravel, within said "Community" area, should be prohibited.

That no change of any kind or character occurred during the period of less than eight months between the enactment of said zoning ordinance and said grant of said application for a variance permit, or between the enactments of said two zoning ordinances in 1916 and 1946, respectively, which tended in any way to alter, or otherwise affect, the conditions upon which it had been found and determined in the enactments of said Zoning Ordinances, that the general public welfare, convenience, and safety, and the welfare and safety of the inhabitants of the community in which said "Critical" area is located, and the preservation of the property rights of the inhabitants of said "Community" area, required a continuance of the prohibition of such operations within said "Community" area.

That at the time when said application by said John D. Gregg for said variance permit, was made, and was pending, and at the time when said application was granted by said City Council, as aforesaid, it was a definite improbability, and always had been a definite improbability, that any practical difficulty, or any unnecessary hardship or result inconsistent with the general purposes of any of said Zoning Ordinances, would result from the strict and literal interpretation and enforcement of the provisions of said Zoning Ordinances.

That there was not during said period, and never has been, any exceptional or extraordinary circumstance or condition, applicable to the property, or to the intended use of the property, as to which said variance permit was sought and obtained, as aforesaid, that did not apply generally to the property or class of uses in the same district or zone.

That such a variance was never necessary for the preservation or enjoyment of any substantial property right of said John D. Gregg possessed by other property in the same zone and vicinity.

That there never was a time within the fifteen years, and longer, immediately last past, when it would not have been materially detrimental to the public welfare, or injurious to the property or improvements, in the zone or district in which the land which comprises said "Critical" area is located, to grant such a variance permit, or when the granting of such a variance permit would not adversely affect the Master Plan of said Zoning Ordinances.

That the conduct of the eleven members of said City Council at the session of said City Council whereat said appeal of said defendant John D. Gregg was considered, and said variance permit was granted, and who controlled the deliberations and action of said City Council in respect of said matter, was arbitrary, unreasonable, unfair, capricious, and farcical. About one and one-half hours of the time of said session was allotted by said City Council to said applicant John D. Gregg, and barely twenty minutes were allowed to the opponents of said application including these plaintiffs, and the representatives of said City Board of Education and said City Playground Commission, who were present and desired to express, and support, their protests against said application, and no time was allowed said protestants for rebuttal.

That the attitude, conduct, and votes of said eleven members of said City Council, are inexplicable upon any rational ground, and then were, and now are, utterly repugnant to the concept and objectives of said zoning plan, and subversive of the public welfare, health, and safety, and of the property rights of the land owners and residents within said "Community" area, including these [139] named plaintiffs, and all other similarly situated on whose behalf this action is also begun and is maintained.

XX.

That there did not exist at the time when said application was made, or at any time thereafter,

and there does not now exist, any necessity either public or private, for the commercial production of rock, sand, or gravel, from, or upon any of the lands which comprise said "Critical" area, and such a use of said property is not, and never has been, essential or desirable to the public convenience or welfare, or in harmony with the various elements or objectives of the Master Plan of Zoning as adopted and declared by said defendant city, as aforesaid.

That there is now, and continuously for many years immediately last past there has been, an adequate, available, quantity of commercial rock, sand, and gravel, in the natural deposits of said materials in the areas in Los Angeles County, wherein the commercial production of said materials is reasonably permissible, and is economically feasible, to supply all of the needs and demands for said materials, of a quality reasonably comparable to the quality of such materials that could be produced from the lands in said "Critical" area.

That a permanent prohibition of any operation for the commercial production of rock, sand, and gravel, from or upon said lands which comprise said critical area, would not create any material shortage in the available quantity of any of said materials in any market available for said materials, and would not tend to deprive any potential consumer of such materials, either public or private, of a supply of such materials adequate to satisfy his needs as and when they arise, and would not tend, in any manner, to affect prejudicially the public welfare, health, or safety.

That there were at the time when said application was made, at all times since has been, and now are, substantial stockpiles of [131] said processed materials at the processing plants in said San Fernando Valley, for which there has not been, and is not now, any market demand for either public or private use, and that said materials, in quality, are equal to, or better, than the materials which could be produced from or upon said "Critical" area, and said materials were and are available upon demand at prices reasonably comparable to the prices which could be reasonably obtained for the materials which could be produced from or upon said "Critical" area.

XXI.

That within a few days, to wit, on or about October 10, 1946, after the granting of said variance permit by said City Council, as aforesaid, these named plaintiffs caused to be served upon said defendants, a notice in writing that an action would be begun against said defendants in the above entitled court, as quickly as an appropriate complaint could be reasonably prepared, wherein these plaintiffs would seek to permanently enjoin said defendant city from permitting, and said defendant John D. Gregg from engaging in, any operation for the commercial production of rock, sand, and gravel within, or upon any of the lands within said "Critical" area.

XXII.

That said defendant John D. Gregg threatens to, and probably will, unless restrained by an exercise of judicial authority, immediately begin to excavate the land which comprises said "Critical" area, for the commercial production of rock, sand, and gravel.

That for said purpose, said John D. Gregg threatens to, and will if permitted so to do, excavate said "Critical" area to a depth of one hundred and fifty feet, or more, with a sidewall slope of not more than one horizontal foot to each vertical foot of depth, and which sidewalls at surface will extend to fifty feet, or less, from the property lines and existing streets which now bound said "Critical" area. That such an extraction of said materials from said land, would create a permanent void upon said land, because there is not, and [132] cannot be, any reasonable, economical, or practicable, means available for filling such a void upon said land.

That the structure and placement of the materials which compose said lands to said depth, are such that it is a reasonable probability and expectancy that in the course of time, by natural processes of erosion, the sidewalls of such a pit, at their upper surface, would recede until a slope of not less than one and one-half feet horizontally for each vertical foot of depth had been attained. That, for the reasons herein stated, it is a reasonable probability and expectancy, that a pit excavated upon said lands fifty feet distant from the property lines and public streets which now bound said lands, to a depth of

one hundred feet upon a slope of one horizontal foot to each vertical foot of depth, would substantially encroach, in the course of time, upon said public streets, and upon the lands which now bound said "Critical" area, and upon the lands abutting upon streets opposite the lands which comprise said "Critical" area.

XXIII.

That within and across said "Community" area, almost daily, the wind blows with a moderately strong intensity from southwest to northeast, and from northeast to southwest, and frequently within and across said "Community" area, vagrant winds of equal intensity blow in different and varying directions, and annually in the spring and fall, a wind of great intensity blows with moderate frequency, within and across said "Community" area in varying directions. It is a reasonable expectancy that the influence of natural laws which control and direct the vagaries of said winds, will persist permanently.

XXIV.

That any operation in the excavation of rock, sand, and gravel, on a commercial scale, within or upon said "Critical" area, would frequently, almost daily, pollute the air with dust and dirt, and that said dust and dirt in substantial and obnoxious quantities would be carried by said winds to the properties, respectively, of [133] these plaintiffs, and of others within said "Community" area,

similarly situated, and would be deposited upon said properties, and in the homes, and upon the persons, of these plaintiffs, and of others similarly situated.

That such a pollution of the air, and deposits of dust and dirt upon the properties and persons, and within the homes, of these plaintiffs, and of others similarly situated, is a natural and necessary consequence of any excavation within and upon said lands for the commercial production of rock, sand, and gravel, and such occurrences would constitute a dangerous, obnoxious, and deleterious condition, upon the premises of these plaintiffs and of others similarly situated, and upon the highways, and in places of public gatherings, within and throughout said "Community" area, and would substantially deprive these plaintiffs, and all others similarly situated, of their right to enjoy, and of their enjoyment, of their properties and homes, and of said highways, and of said places of public assembly, within said "Community" area.

XXV.

That any operation in the excavation of rock, sand, and gravel, on a commercial scale, within or upon said "Critical" area, would, as a natural and necessary consequence thereof, produce loud, rasping, grinding, and obnoxious noises. That said noises would penetrate to the properties and homes of these plaintiffs, and of others similarly situated, within said "Community" area, and would substantially and materially disturb these plaintiffs,

and said other persons, in their respective use and enjoyment of their properties and homes, and would substantially and materially impair and diminish their enjoyment, respectively, of their properties and homes, and of the highways and places of public assembly, within said "Community" area.

XXVI.

That any operation for the commercial production of rock, [134] sand, and gravel, within or upon said "Critical" area, would, as a natural consequence thereof, substantially depreciate the intrinsic value and the market value of all of the lands whether in public or in private ownership, within said "Community" area, outside of said "Critical" area, and if persisted in until a substantial portion of said "Critical" area had been excavated to a depth of about fifty feet or more, such operations would practically destroy the intrinsic value, and the market value, of said lands.

XXVII.

That the named plaintiff West Coast Winery, Inc., is a corporation regularly organized and existing as such, and ever since the year 1924, it has been, and now is, the owner and in possession of that certain five-acre parcel of land marked "A" upon said map, and which is surrounded by said "Critical" area. That Peoria Street, upon which said premises abut to the westerly thereof is a public highway forty feet wide.

That said premises were improved in 1928, with substantial residential facilities, and said residential facilities ever since have been, and now are, used for residential purposes, and continuously for more than two years immediately last past have been, and now are, occupied and used by five persons for residential purposes.

That in 1933 said plaintiff further improved said premises by the construction of a reinforced concrete building, and underground storage facilities, for the conduct of a retail winery business upon said premises. That it would reasonably cost \$250,000 to presently reproduce said improvements. That all of said improvements were completed more than five years ago and ever since their completion said facilities have been, and now are, in use in the conduct of said business.

That said nine named plaintiffs Archie I. Way, G. T. Winkler, Donald Kersey, Charles Wise, William Franklin Borrowe, Frank E. Wright, B. R. Frondren, Robert D. Hopkins, and R. E. Bertell, are, and were when said application was first made by said John D. Gregg for said variance permit, as herein alleged, the owners, respectively, and in possession, of those certain twelve parcels of real property which abut upon Wicks Street, on the westerly side thereof, southerly from said "Community Park," and which face said "Critical" area, and which parcels are numbered, respectively, as 11, 12, 13, 14, 15, 17, 19, 20, 21, 23, 24, and 25, upon said map. That said nine named persons continuously, were such owners and in possession of said proper-

ties, respectively, during the entire period following these dates, respectively, March 1946, as to said Archie I. Way; 1931, as to said G. T. Winkler; August 1945, as to said Donald Kersey; 1928, as to said Charles Wise; April 1945, as to said William Franklin Borrowe; April 1940, as to said Frank E. Wright; February 1946, as to said B. R. Fondren; January 1946, as to said Robert D. Hopkins, and 1929, as to said R. E. Bertell. That during said periods, respectively, said twelve properties were, and now are, improved, and occupied and used by said named plaintiffs, respectively, for residential uses and purposes, excepting that said plaintiff B. R. Fondren owns said parcels numbered 19, 20, and 21, and personally occupies said parcel number 19, and leases to others said parcels numbers 20 and 21, and said Robert D. Hopkins owns said parcels numbers 23 and 24, and occupies said property numbered 23, and leases to others said property numbered 24.

That said three named plaintiffs, Dwight Moore, T. O. Easley, and Betsy Ross, are, and were when said application by said John D. Gregg, was first made as herein alleged, the owners, respectively, and in possession of those certain three parcels of real property which abut upon Wicks Street, on the easterly side thereof, southerly from that portion of said "Critical" area which abuts upon the easterly side of said Wicks Street, and which parcels are numbered, respectively, as 16, 18, and 26, on said map.

That said three named persons, continuously, were such [136] owners and in possession of said proper-

ties, respectively, during the entire periods following these dates respectively, November, 1944, as to said Dwight Moore; February 1946, as to said T. O. Easley, and 1925, as to said Betsy Ross. That during said periods, respectively, said three properties were, and now are improved, occupied, and used, by said three named plaintiffs, respectively, for residential uses and purposes.

That said four named plaintiffs, Frank J. Smythe, Helen Churchward, Louise R. Taylor, and Frank Lutizetti, are, and were when said application was made by said John D. Gregg, as aforesaid, the owners, respectively, and in possession, of those certain four parcels of real property which lie between said "Critical" area and Glenoaks Boulevard easterly of said parcels numbered 22 and 26 on said map, and which four parcels are numbered, respectively, 27, 28, 29, and 30, upon said map.

That said four named plaintiffs, continuously, were such owners and in possession of said properties, respectively, during the entire periods following these dates, respectively, September 1945, as to said Frank J. Smythe; October 1945, as to said Helen Churchward; April 1943, as to said Louise R. Taylor, and February 1940, as to said Frank Lutizetti. That during said periods, respectively, said four properties were, and now are, improved, and occupied and used by said named plaintiffs, for residential uses and purposes.

That said named plaintiff, Patrick Adams, is, and for more than five years continuously last past has been, the owner and in possession of that certain

parcel of real property which lies southerly and easterly of said "Critical" area, and abuts upon Pendleton Street, on the westerly side thereof, and is numbered 31 on said map. That during said entire period said property has been, and now is, improved, and occupied and used, by said named plaintiff, for residential uses and purposes.

That said named plaintiff, Paul C. Brown, is, and continuously [137] since November 1945, has been, the owner and in possession of that certain parcel of real property which lies easterly and northerly of said "Critical" area, and abuts upon Pendleton Street, on the westerly side thereof, and is numbered 32 on said map. That during said period said property has been, and now is, improved and occupied and used by said Paul C. Brown, for residential uses and purposes.

That said named plaintiffs, D. H. Calley, and C. C. Campbell, are, and continuously last past since 1945, and February 1946, respectively, the owners, and in possession, of those certain two parcels of real property which lie immediately northerly of said "Critical" area, and between Peoria and Wicks Streets, and are numbered respectively, 6, and 10, upon said map. That during said periods said properties have been, and now are, improved, and occupied and used by said plaintiffs, respectively, for residential uses and purposes.

That said named plaintiff W. L. Calley is, and for more than one year continuously last past has been, the owner and in possession of that certain parcel of real property which lies immediately

northerly of said "Critical" area, and between Peoria and Wicks Streets, and is numbered 5 upon said map, and is using, and during said entire period has used said property for residential uses and purposes.

That said named plaintiffs, Lillian Lewis, W. R. Shadley, and George J. King, are, and continuously last past for the periods since 1938 as to said Lillian Lewis; December 1936, as to said W. R. Shadley, and June 1946 as to said George J. King, respectively, have been, respectively, the owners, and in possession of those certain three parcels of real property which lie northerly of said "Community Park," and abut upon Wicks Street, on the westerly side thereof, and are numbered, respectively, 7, 8, and 9, on said map. That during said periods, respectively, said properties have been, and now are, improved, and occupied and used by said named plaintiffs, respectively for residential uses and purposes. [138]

That said named plaintiff Jackson Earl Wheeler, is, and for more than five years continuously last past has been, in possession of that certain parcel of real property located at the northeast corner of Helen and Art Streets, northeasterly of said "Critical" area, and numbered 33 upon said map. That said real property is, and during said entire period has been, occupied and used by said Jackson Earl Wheeler for residential uses and purposes.

That said property which comprises fifteen acres, and which abuts upon Wicks Street on the westerly said of said street, and immediately across said

street from said "Critical" area, and which is marked "Community Park and Hall" upon said map, is, and since 1928, continuously has been, owned by the Park Department of said defendant city and under the management of the Playground Department of said defendant city. That said property and the facilities thereof are, and for more than one year immediately last past, were, patronized and used by not less than 100 and sometimes by 800 persons each day, and by not less than 1000 and sometimes by 2000 persons each week.

XXVIII.

That the Planning Commission; Park Department; Playground and Recreation Department, and Board of Education, of said defendant city, have actively, consistently, vigorously, and publicly, opposed each and every application for a variance permit to conduct operations for the commercial production of rock, sand, and gravel, within said "Community" area, and are now opposed to the conduct of such operations within or upon any lands lying within said "Community" area, either under said variance permit, or otherwise, upon the grounds, among others, that such operations would be substantially and seriously detrimental to the public welfare, health, and safety, and particularly to the health and safety of many hundreds of young children who attend the places of worship; assembly; recreation, and training, maintained within said area; would be injurious to the properties within said area which are publicly owned, main-

tained, and operated; would be [139] substantially and seriously injurious to a very large number of properties in said area, in private ownership; and would destroy a substantial residential community which has been builded during a period of nearly thirty years upon public and private assurances, as herein related, that said area would be maintained and protected against any encroachment of the business of commercially producing rock, sand and gravel.

That this action is begun, and will be maintained, upon behalf of said four agencies of said defendant city, although not named as plaintiffs herein, because in their ownership and operation of valuable properties within said "Community" area, and their attitude in respect of the preservation thereof, as herein set forth, the situation of said agencies is similar to the situation of these named plaintiffs in respect of their own properties, as herein set forth.

XXIX.

That resident within said "Community" area there are, and for more than five years immediately and continuously last past there has been, more than one thousand persons who are not named as plaintiffs herein, but who, in the enjoyment of their homes within said "Community" area, and in their health and safety, would be substantially, materially, and injuriously affected in kind substantially as would be these named plaintiffs, but in varying de-

gress of lesser frequency and intensity, from any operation for the commercial production of rock, sand, and gravel, within or upon said "Critical" area, excepting that none of the properties of said persons would be in any danger of any encroachment of any pit which might be excavated upon said "Critical" area. That said numerous persons vigorously protest any conduct of any such operation within said "Community" area, and for these reasons this action is also begun, and will be maintained, for their benefit.

That outside of said "Community" area, but adjacent thereto to the north, northwest, and southeast thereof, and within said "Map" [140] area, there exists, and continuously for more than five years immediately last past there has existed, a substantial residential development, and use of property, as indicated by the numerous black squares upon said map. That the inhabitants of said area number more than three thousand, and they will be substantially, materially, and injuriously, affected by said proposed operations of said John D. Gregg within and upon said "Critical" area, substantially identical in kind but with lesser frequency and intensity, as these named plaintiffs, in the security of their persons, and in the enjoyment of their homes excepting that none of the properties of said inhabitants will be in danger from any encroachment of any pit which may be excavated upon said "Critical" area.

XXX.

That said "Community" area lies at an altitude of about one thousand feet, excepting that the extreme northerly and northeasterly areas thereof are fringed with low lying hills which rise in graceful contours from the plane of said "Community" area to varying elevations which at maximum are about five hundred feet higher than the elevation of the plane of said area. That said low lying hills, for more than one year continuously preceding said grant of said variance permit, were under extensive development for the subdivision, improvement, and use, thereof, for residential uses and purposes.

That within said "Community" area, two major paved public highways, namely, Glenoaks Boulevard and Sunland Boulevard, conjoin and provide a practical, feasible, and economical, means for motor transport north, south, east, and west, to the centers of industrial and commercial activities throughout the metropolitan Los Angeles area, wherein the residents of said "Community" area may obtain profitable employment.

That continuously for more than one year immediately preceding the public announcement of said grant of said variance permit, [141] there was a heavy and continuing demand for residential lots within said "Critical" area, for residential, improvement and use.

That said American Legion Hall located on Sunland Boulevard as shown upon said map, is, and for more than two years continuously last past has been, owned, occupied, and used, by American

Legion Post Number 520. That said American Legion Post has, and had during said period, a membership of one hundred and twenty-five members. That immediately, to wit, on October 3, 1946, upon being informed that on the preceding day said City Council had granted said variance permit, said American Legion Post, by its letter addressed to Honorable Fletcher Bowron, as the Mayor of said defendant City, vigorously protested the grant of said variance permit as subversive of the general public welfare, health, and safety, and as particularly destructive of the welfare, health, and safety, of the inhabitants of said "Community" area. That said protest is, and ever since its making, as aforesaid, has been, a true reflection of the attitude of said American Legionnaires in respect of said variance permit.

That none of the areas of land owned, occupied, or used, by the named plaintiffs, respectively, or of those other persons similarly situated, and on whose behalf this action is also begun and will be maintained, as aforesaid, is sufficiently large to support, or justify, any commercially economical, feasible, or practical, development or use for the commercial culture of horticultural or agricultural products.

XXXI.

That each of said named plaintiffs, and of those numerous other owners who reside upon their properties, within said "Community" area, respectively, acquired his and their said premises, with the knowledge that said "Community" area had been

restricted, as herein set forth, against any extension therein of any operation for the commercial production of rock, sand, and gravel, and in the belief, and in reliance thereupon, that said "Community" area would be [142] developed, improved, and used, as a predominantly residential area, immune, and to remain immune, to any encroachment therein, or thereupon, of any operation for the commercial production of rock, sand, and gravel, substantially in accordance with a general policy for such improvement, development, and use, and for such restriction, in conformity with a master plan of governmental zoning substantially as established and maintained by said defendant city continuously for more than thirty years prior to October 2, 1946, as herein set forth.

That excepting for such knowledge, belief, and reliance, said named plaintiffs would not have made their investments, respectively, in the acquisition, improvement, and use, of their said properties, as aforesaid.

That at the time when said defendant John D. Gregg acquired the lands which comprise said "Critical" area, as aforesaid, said defendants knew, and the facts were, that said named plaintiffs had acquired, improved, and used, and were, using their said premises, respectively, for residential purposes, as aforesaid, and that said defendant city, and said land company in which said defendant John D. Gregg, was, and is, president and a substantial owner, as aforesaid, had actively encouraged said named plaintiffs so to do, by their conduct as herein set forth.

XXXII.

That the lands lying within, and which constitute, said "Critical" area, are substantially the same in the structure and placement of the materials of which they are composed, and in their top soil condition, and in their surface contour, as the lands of these named plaintiffs, and of all other similarly situated, for whose benefit this action is begun and maintained.

XXXIII.

That said defendant John D. Gregg, threatens to, and will unless restrained by the order or judgment of the Court herein, enter upon said lands within said "Critical" area, and excavate thereon, or [143] therein, for the commercial production of rock, sand and gravel.

That in excavation of said threat said John D. Gregg, since the grant of said variance permit on October 2, 1946, and notwithstanding the notice served upon him on behalf of these plaintiffs, as aforesaid, has made an extensive excavation upon his own land lying immediately southerly of Glenoaks Boulevard, as hereinbefore alleged, and, in extension thereof, has excavated extensively upon and beneath said Glenoaks Boulevard, opposite and up to said "Critical" area, and has installed within said excavations a large metal pipe within which he proposes to operate the belt conveyer by which he proposes to convey the materials which he

threatens to excavate and primarily crush upon or within said "Critical" area, under said variance permit, to the processing plant which he maintains and operates upon the property which he owns southerly from said "Critical" area, and from said Glenoaks Boulevard, as aforesaid.

That the "primary crusher" referred to in condition number 2 in the statement of the conditions upon which said variance permit was granted, as set forth in paragraph XVIII hereof, and which "primary crusher" said John D. Gregg threatens to use, and must and will use, in any operation for the commercial production of rock, sand and gravel, under said variance permit, within or upon the lands which comprise said "Critical" area, is a powerful crushing mechanism constructed of metal which is necessarily and customarily used in such an operation, for the purpose of crushing into many smaller units at the place of excavation, the numerous boulders encountered in such excavation, which, in size and weight, are too large and heavy, without such crushing, for economical, feasible, and practical, transportation from the place of their occurrence to the processing plant of the operator.

That such crushing operations will produce loud, crunching, rasping, and obnoxious noises, and substantial quantities of dust and dirt, which will be carried by the winds within said "Community" area, to the homes of the inhabitants of said "Community" area, and to the [144] school, churches, and other places of public and private assembly within said "Community" area, as herein alleged.

and will substantially and materially interfere with, interrupt, and impair, the comfortable enjoyment of their homes and of said other places of assembly, within said "Community" area, by the inhabitants thereof.

That a substantial part of said offensive dust and dirt will consist of a granular silica in powdery form, which, upon being inhaled by the inhabitants of said area, and particularly by children of tender years, is conducive to the development and aggravation of tuberculosis and other respiratory and pulmonary afflications.

That a "screen planting" upon the margins of said "Critical" area, as required conditionally within said variance permit, would be a sham and a farce. It would not prevent, it would invite, the exploration of the tangled growth upon the brink of the deep and dangerous pit by innumerable children of tender years who reside within said "Community" area, or, otherwise, who visit the many places of worship, recreation, training, and public assembly, provided within said "Community" area, and by its tendency to conceal the grave dangers, otherwise obvious, and unavoidably incident to the maintenance of such a pit in such a community, said "screen planting" would substantially contribute to the gruesome sacrifice of children dead and injured, which the present and future generations would be required to make to such a misconceived public necessity, as the records of the Coroner's office of this county verify, as herein alleged.

XXXIV.

That said conduct of said defendant city in the purported exercise of its police power in respect of the zoning of said "community" area, is oppressive and discriminatory wherein under and by its said conduct of October 2, 1946, it granted unto said defendant John D. Gregg said variance permit, which was and is a special right and privilege not given, but denied, to all other owners of real [145] property situated in said "Community" area. That said act by said defendant city, was and is in excess of the just limits of its police power, is in violation of Article 1, Section 21, of the Constitution of the State of California, and of the Constitution of the United States of America, and is void.

XXXV.

That said conduct of said defendant city in the purported exercise of its police power in respect of the zoning of said "Community" area, wherein it granted said variance permit to said defendant John D. Gregg, constitutes a taking of the properties of these named plaintiffs, and of all others similarly situated within said "Community" area, without any public necessity therefor, and without just compensation to said persons, or to any of them, in violation of the constitutions, respectively, of the State of California, and of the United States of America, and is void.

XXXVI.

That said conduct of said defendant city, in the purported exercise of its police power, as aforesaid, wherein it granted said variance permit to said defendant John D. Gregg, is, and was, an unjust, oppressive, and arbitrary, exercise of its police power, and is an unwarranted invasion and confiscation of the properties, and property rights, of these named plaintiffs, and of all others similarly situated within said "Community" area, and is void.

XXXVII.

That the conduct of said defendant city, in the purported exercise of its police power, as aforesaid, wherein it granted said variance permit to said defendant John D. Gregg, bears no relation to the ends for which the police power exists, but is a clear and deliberate invasion under the guise of the police power, of the personal and property rights of these named plaintiffs, and of all others similarly situated within said "Community" area, for whose benefit this action is begun and maintained, and is void. [146]

XXXVIII.

That the real purpose of the eleven members of the City Council of said defendant city, who voted for the grant of said variance permit, and by whose votes said permit was granted, was not to protect the public welfare, health, or safety, or to promote any objective of any just or permissible exercise of

the police power of said defendant city, but was for the purpose of preferring said John D. Gregg as against all other property owners within said "Community" area, in the use and enjoyment of their properties within said area, respectively, and to enable said John D. Gregg to vastly expand his operations of producing rock, sand, and gravel, commercially, by the use of his facilities therefor, now maintained by him upon a tract of land comprising about sixty-two and one-half acres, situated within said M-3 zone adjoining said "Community" area to the south, as aforesaid, and of which land only about 35 acres have been excavated, without the necessity or expense of removing his said facilities to a different location in order to expand his ownership of lands upon which, by the use of said processing facilities, he could engage in the commercial production of rock, sand, and gravel.

That the strict and literal interpretation and enforcement of the provisions of said zoning laws as to the lands within said "Community" area, including the lands which comprise said "Critical" area, would not produce, or accentuate, any practical difficulties, unnecessary hardships, or results inconsistent with the general purposes of said zoning laws, in relation to said defendant John D. Gregg, or otherwise.

That plaintiffs are informed and believe, and therefore allege, that said defendant John D. Gregg, is, and for more than five months continuously last past, has been the owner, or in control of, more than one hundred and forty acres of unexcavated land

situated within the San Fernando Valley within the corporate limits of said defendant city, which lands are as well, or are better adapted to [147] the commercial production of rock, sand, and gravel, than are the lands which comprise said "Critical" area, and upon which the conduct of such operations is permissible, and upon which such operations could be conducted by him, economically, feasibly, and practically.

XXXIX.

That if operations for the commercial production of rock, sand, and gravel, are extended to, and conducted within, or upon any of the lands lying within said "Critical" area, and within the provisions of, said variance permit, the enjoyment by these named plaintiffs and of others similarly situated in said "Community" area, of their said homes and properties within said "Community" area, will be substantially, materially, and seriously, disturbed, interfered with, interrupted, and diminished, immediately, and that the injuries and damage arising therefrom will progressively expand as such operations are extended upon, or within, said "Critical" area, and that by reason thereof these plaintiffs, and all other persons similarly situated within said area, would be substantially and irreparably damaged.

XL.

That if operations for the commercial production of rock, sand, and gravel, are extended to, and conducted within or upon the lands lying within said

“Critical” area, under and within the provisions of said variance permit, the actual value, and the reasonable market value, of the properties, respectively, of these named plaintiffs and of all others similarly situated with said “Community” area, located within said “Community” area, as herein described, will be immediately, substantially, and materially, depreciated, and progressively, as such operations continue, will be substantially destroyed, and that thereby these named plaintiffs and all others similarly situated within said “Community” area, will be irreparably [148] and permanently damaged.

XLI.

That said defendant John D. Gregg, by his conduct as herein set forth, is estopped to claim or exercise any right, privilege, or benefit, under said variance permit, or to conduct any operations within or upon the lands which comprise said “Critical” area, for the commercial production of rock, sand, or gravel.

XLII.

That said defendant city by its conduct, as herein set forth, is estopped to grant said variance permit, or to permit said John D. Gregg to exercise or enjoy any benefit, right, or privilege, under said variance permit, or to authorize or permit any extension of any operation for the commercial production of rock, sand, or gravel, into said “Community” area, or within or upon any of the lands located within said “Community” area, or within said “Critical” area.

XLIII.

That in the circumstances herein alleged, right and justice demand that in order to prevent manifest wrong and injustice to the innumerable persons, organizations, and public agencies, for whose benefit this action is begun and maintained, as herein set forth, said defendant city be permanently enjoined from authorizing, or permitting, said John D. Gregg, or anyone, to conduct any operation for the commercial production of rock, sand, or gravel, within or upon any lands located within said "Community" area, and that said grant of a variance permit to said John D. Gregg to conduct such operations within said area be declared void as an act in excess of any reasonable exercise of the police power of said defendant city, and that said defendant John D. Gregg be permanently enjoined from exercising any right or privilege which derives from said purported grant of a variance permit.

XLIV.

That said John D. Gregg does not reside, and never has [149] resided, within said "Community" area, and all of his revealed thought, activities, and energy, have been, and are being, expended toward the destruction of said community, and not at all toward the preservation and upbuilding of said community.

That by reason of the conduct of said defendant John D. Gregg, as aforesaid, the occupancy by these named plaintiffs, of their homes, respectively, has been, and is, rendered substantially and materially uncomfortable, and their enjoyment of their

homes and properties, respectively, has been, and is, substantially, materially, and grievously, interfered with and impaired, and that by reason thereof these named plaintiffs have been damaged in the sum presently undeterminable, but in excess of one hundred thousand dollars, and that said injury and damage is a continuing tangible injury and damage, and that a monetary evaluation thereof is materially higher each ensuing day. That no part of said damages has been paid, or in any manner satisfied, and the whole thereof is owing and unpaid.

XLV.

That said conduct of said defendant John D. Gregg, has been, and is, oppressive, fraudulent, and malicious, in respect of these named plaintiffs and of all others, similarly situated in said "Community" area, and this action, therefore, is a proper action in which to assess against said defendant John D. Gregg punitive damages for the sake of example, and by way of punishing said defendant for his said conduct, and that the sum of \$250,000. is a reasonable sum to be assessed herein for said purposes.

XLVI.

That plaintiffs do not have any plain, adequate, or speedy action of law.

Wherefore, plaintiffs pray that:

(1) the action of said defendant City in granting said variance permit, and said variance permit, be declared void, and of [150] no force, virtue, or effect, in law or in equity;

(2) that said defendant City be enjoined from granting or undertaking to grant, any variance permit under existing zoning laws, for the conduct of and from permitting any operation upon or within any lands situated within said "Community" area, for the commercial production of rock, sand, and gravel;

(3) that said John D. Gregg be enjoined from exercising any right, benefit, or privilege, under said variance permit, and from conducting any operation for the commercial production of rock, sand, and gravel, within, or upon, any of the lands situated within said "Critical" area, or within said "Community" area;

(4) that each of said defendants be preliminarily restrained from doing anything as to which their permanent restraint is herein sought;

(5) that plaintiffs have and recover from said defendant John D. Gregg, their actual damages accrued up to the date of judgment herein, as the same may be determined upon the trial hereof;

(6) that plaintiffs do have and recover of said defendant John D. Gregg, punitive damages in the sum of \$250,000, for the sake of example, and by way of punishing said defendant for his conduct as herein alleged, and

(7) that plaintiffs have such other and further relief as to the court shall seem equitable, and for costs of suit.

/s/ OLIVER O. CLARK,

/s/ ROBERT A. SMITH,

Attorneys for Plaintiffs.

State of California,
County of Los Angeles—ss.

Jackson Earl Wheeler being by me first duly sworn, deposes and says: That he is one of the plaintiffs in the above entitled action; that he has read the foregoing Complaint in Equity for Injunction and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ JACKSON EARL WHEELER.

Subscribed and sworn to before me this 22nd day of November, 1946.

/s/ ROBERT A. SMITH,
Notary Public in and for said County and State.
My Commission Expires Sept. 23, 1948.

[Endorsed]: Filed Nov. 22, 1946. [152]

In the Superior Court of the State of California,
in and for the County of Los Angeles

No. 522031

JACKSON EARL WHEELER, et al.,

Plaintiffs,

vs.

J. D. GREGG, et al.,

Defendants.

Holbrook & Tarr and Clyde P. Harrell, Jr., 740 Rowan Bldg., Los Angeles 13, Calif. MI 2191; and Donald J. Dunne, 215 W. 7th St., Los Angeles, Cal. (TR. 7036), Attorneys for defendant John D. Gregg.

ANSWER OF THE DEFENDANT J. D. GREGG

Defendant J. D. Gregg, for himself alone, answers plaintiffs' complaint on file herein as follows:

I.

This defendant admits the allegations contained in paragraphs I and XXI of plaintiffs' complaint.

II.

This defendant denies, both generally and specifically, each and every allegation contained in paragraphs III, IV, X, XI, XIV, XVI, XX, XXIV, XXV, XXVI, XXVII, XXVIII, XXIX, XXXI, XXXII, XXXIV, XXXV, XXXVI, XXXVII, XXXVIII, XXXIX, XL, XLI, XLII, XLIII, XLIV, XLV and XLVI of plaintiffs' complaint.

III.

Answering paragraph II of plaintiffs' complaint, this defendant admits that during the year 1934 he began, and subsequent thereto [154] accomplished, the excavation of rock, sand and gravel on a tract of land of approximately 62 acres owned by him, which said land lies in M-3 Zone and is distant about 300 feet southerly from Glenoaks Boulevard. This defendant further admits that he maintains upon said land machinery and equipment and other facilities for the excavation of rock, sand and gravel, and for the processing of the same for market.

Further answering said paragraph II of plaintiffs' complaint, this defendant alleges that he has not sufficient information or belief to enable him to answer any of the other allegations contained in said paragraph, and basing his denial on the lack of such information or belief denies, both generally and specifically, each and every allegation contained in said paragraph not expressly admitted in this answering paragraph.

IV.

Answering paragraph V of plaintiffs' complaint, this defendant admits that on the 16th day of February, 1916, the City of Los Angeles enacted Ordinance No. 33,761, and that said ordinance remained in full force and effect until the same was re-enacted and superseded by the provisions of Ordinance No. 74,140, which ordinance became effective October 27, 1934. This defendant further admits that

on or about the 11th day of April, 1918, certain lands which comprise the area described as a map area on Exhibit A attached to plaintiffs' complaint were annexed to the City of Los Angeles.

But this defendant denies, both generally and specifically, each and every allegation contained in said paragraph V of plaintiffs' complaint not expressly admitted in this answering paragraph.

V.

Answering paragraph VII of plaintiffs' complaint, this defendant alleges that he has not sufficient information or belief to enable him to answer the allegations contained in paragraph VII of plaintiffs' [155] complaint, and basing his denial upon the lack of such information or belief denies, both generally and specifically, each and every allegation contained in said paragraph VII.

VI.

Answering paragraph VIII of plaintiffs' complaint, this defendant alleges that he has not sufficient information or belief to enable him to answer the allegations contained in paragraph VIII of plaintiffs' complaint, and basing his denial upon the lack of such information or belief denies, both generally and specifically, each and every allegation contained in said paragraph VIII.

VII.

Answering paragraph IX of plaintiffs' complaint, this defendant admits that during the years 1945

and 1946 the defendant City of Los Angeles made an extensive re-survey and study of its master plan of zoning within its municipal boundaries, including the area lying in what is commonly known and referred to as the San Fernando Valley, and on March 7, 1946, enacted Ordinance No. 90,500, which said ordinance became effective on June 1, 1946. But this defendant denies each and every allegation contained in said paragraph IX not expressly admitted in this answering paragraph; and alleges that said Ordinance No. 90500 among other things, amended Article 2 of Chapter 1, of the Los Angeles Municipal Code; that it is provided by the provisions of Section 12.24 of the Los Angeles Municipal Code, in part, as follows:

“A. Location of Permitted Uses—Wherever it is stated in this Article that the following uses may be permitted in a zone if their location is first approved by the Commission, said uses are deemed to be a part of the development of the Master Plan or its objectives and shall conform thereto. Before the Commission makes its final determination a public hearing by the Commission shall be mandatory for certain uses and optional for others: [156]

“1. Uses for which at least one public hearing shall be held include: airports or aircraft landing fields; cemeteries; educational institutions; and golf courses (except driving tees or ranges, miniature courses and similar uses operated for commercial purposes).

“2. Uses for which a public hearing is optional include: churches (except rescue mission

or temporary revival); schools, elementary and high; and public utilities and public service uses or structures.

“B. Additional Uses Permitted—The Commission, after public hearing, may permit the following uses in zones from which they are prohibited by this Article where such uses are deemed essential or desirable to the public convenience or welfare, and are in harmony with the various elements or objectives of the Master Plan:

“1. Airports or aircraft landing fields.

“2. Cemeteries.

“3. Development of natural resources (excluding the drilling for or producing of oil, gas or other hydrocarbon substances) together with the necessary buildings, apparatus or appurtenances incident thereto.

“4. Educational institutions.

“5. Governmental enterprises (federal, state and local).

“6. Libraries or museums, public.

“7. Public utilities and public service uses or structures. * * *

“C. Procedure—Written applications for the approval of the uses referred to in this Section shall be filed in the public office of the Department of City Planning upon [157] forms prescribed for that purpose by the Commission.

“The procedure for holding public hearings shall be the same as that required in Sec. 12.32-C.

“The Commission shall make its findings and determination in writing within forty (40) days from the date of filing of an application and shall forthwith transmit a copy thereof to the applicant. No decision of the Commission under this Section shall become effective until after an elapsed period of ten (10) days from the date the written determination is made, during which time the applicant, or any other person aggrieved, may appeal therefrom to the City Council in the same manner as provided for in Sec. 12.32-E.

“In approving the uses referred to in this Section, the Commission shall have authority to impose such conditions as are deemed necessary to protect the best interests of the surrounding property or neighborhood and the Master Plan.”

VIII.

Answering paragraph XII of plaintiffs' complaint, this defendant admits that in the year 1941 he became President of the Los Angeles Land and Water Company and is the owner of an interest in said Company. But this defendant denies, both generally and specifically, each and every allegation contained in paragraph XII of plaintiffs' complaint not expressly admitted in this answering paragraph.

IX.

Answering paragraph XIII of plaintiffs' complaint, this defendant admits that within five years last past he has acquired by purchase several separate parcels of land located within the area de-

scribed by plaintiff as a "critical" area; but this defendant denies, both generally and specifically, each and every allegation contained in said paragraph [158] XIII not expressly admitted in this answering paragraph.

X.

Answering paragraph XV of plaintiffs' complaint, this defendant admits that on June 2, 1946, he filed an application with the Planning Commission of the City of Los Angeles, requesting that the said Planning Commission grant to him "a conditional use permit" authorizing him to use the property described in paragraph I of plaintiffs' complaint for the purpose of mining rock, sand and gravel on said real property. This defendant admits that in support of said application he represented to the defendant City of Los Angeles that the real property last above referred to was composed of gravel beds and was primarily suitable only for the production of rock, sand and gravel, and that the use to which this defendant proposed to put said real property was in harmony with the various elements and objectives of the master plan of zoning as enacted by the defendant City. This defendant further admits that he represented to the City of Los Angeles in support of said application that there were about 310 acres of rock-bearing land in M-3 Zone in the San Fernando Valley, and that approximately only 23,000,000 tons were available to existing plant facilities and that such tonnage was not sufficient to meet the demands of the market

of the City of Los Angeles for any reasonable period of time. This defendant further admits that he represented to the defendant City of Los Angeles in support of said application for a conditional use permit that the real property described in paragraph I of plaintiffs' complaint was not desirable and was unsuitable for residential purposes but this defendant denies, both generally and specifically, each and every allegation contained in said paragraph XV not expressly admitted in this answering paragraph.

XI.

Answering paragraph XVII of plaintiffs' complaint, this defendant denies, both generally and specifically, each and every allegation [159] contained in said paragraph XVII; and alleges that after a public hearing held by the City Planning Commission on June 20, 1946, on July 25, 1946, said Commission, by unanimous vote of its members present, denied defendant's application for a conditional use permit and rendered its decision in writing; that a copy of said decision is attached hereto marked Exhibit "A," and the same is hereby referred to and by such reference made a part hereof.

XII.

Answering paragraph XVIII of plaintiffs' complaint, this defendant admits the allegations contained in said paragraph, and alleges that at the time the City Council of the City of Los Angeles granted the application of this defendant said City Council made certain findings, which said findings

are included in the minutes of its meeting held October 2, 1946. A true and correct copy of said minutes are attached hereto marked Exhibit "B," and the same is hereby referred to and by such reference made a part hereof.

XIII.

Answering paragraph XIX of plaintiffs' complaint, this defendant admits that the granting of said application was accomplished by the affirmative vote of eleven members of the City Council, who, within eight months immediately preceding said grant, had voted for the adoption of Zone Ordinance No. 90,500 on March 7, 1946. But this defendant denies, both generally and specifically, each and every allegation contained in said paragraph XIX not expressly admitted in this answering paragraph.

XIV.

Answering paragraph XXIII of plaintiffs' complaint, this defendant alleges that he has not sufficient information or belief to enable him to answer the allegations contained in paragraph XXIII of plaintiffs' complaint, and basing his denial upon the lack of such information or belief denies each and every allegation contained in said paragraph.

XV.

Answering paragraph XXX of plaintiffs' complaint, this defendant admits that there is an American Legion Hall located on Sunland Boulevard, but this defendant alleges that he has not sufficient in-

formation or belief to enable him to answer any other of the allegations contained in said paragraph XXX, and basing his denial upon such lack of information or belief denies, both generally and specifically, each and every allegation contained in said paragraph XXX.

XVI.

Answering paragraph XXII and XXXIII of plaintiffs' complaint, this defendant admits that he will, unless restrained by order of court, enter on the lands described in paragraph I of plaintiffs' complaint, and described by plaintiff as a "critical" area, and excavate thereon for the commercial production of rock, sand and gravel. This defendant further admits that since the granting of said conditional use permit on October 2, 1946, he has made an excavation across Glenoaks Boulevard and has caused to be installed a large metal pipe within which he proposes to operate a conveyor belt to convey materials from the property described in paragraph I of plaintiffs' complaint, lying northerly of Glenoaks Boulevard and referred to by plaintiffs as a "critical" area, to the processing plant which he now maintains and operates on the property which he owns immediately southerly of said Glenoaks Boulevard.

This defendant further admits that he proposes to use a "primary crusher" on the lands described in paragraph I of plaintiffs' complaint and referred to by plaintiff as a "critical" area, and that such

“primary crusher” is a powerful crushing mechanism constructed of metal which is necessarily and customarily used in such operations for the purpose of crushing into many smaller units at the place of excavation numerous boulders encountered in such excavation which in size and weight are too large and heavy without such crushing for economical, feasible and practical transportation from the place of their occurrence to the processing plant of the operator. But this defendant denies, [161] both generally and specifically, each and every allegation contained in said paragraphs XXII and XXXIII not expressly admitted in this answering paragraph.

As a second, separate and affirmative defense, this defendant alleges as follows:

I.

That all of the lands described in paragraph I of plaintiffs' complaint are rock, sand and gravel deposits containing rock, sand and gravel materials of the highest quality. That said lands comprise a part of the Tujunga Wash and until the construction of Hanson Dam by the Los Angeles County Flood Control District in or about the year 1940 said lands were subject to inundation. That the deposit of first-grade rock, sand and gravel within said lands is approximately 100 feet in depth on the southerly end thereof and 50 to 60 feet in depth on the northerly end thereof. That rock, sand and gravel operations and excavations have been carried on in the vicinity of this area ever since the year 1908.

II.

That during the years 1945 and 1946 the City of Los Angeles conducted an extensive survey relating to the zoning of land within the corporate limits of the City of Los Angeles and after making said survey enacted Ordinance No. 90,500. Said ordinance went into effect on June 1, 1946. Said ordinance, among other things, amends Article 2, Chapter 1, of the Los Angeles Municipal Code and provides for the first comprehensive system of zoning ever enacted in the City of Los Angeles. Until the enactment of said ordinance no specific zoning covered any of the real property described in paragraph I of plaintiffs' complaint or referred to on Exhibit A attached to plaintiffs' complaint. That all of the land last-above described was subject to Ordinance No. 74,140, adopted by the City of Los Angeles October 27, 1934. That said Ordinance No. 74,140 was enacted for the purpose of [162] limiting the use of land for any purpose other than residential, unless and until said lands were included in a specific zoning plan covering said property or a variance from the provisions thereof was granted in accordance with the procedure prescribed thereby.

II.

By the provisions of Section 12.24 of the Los Angeles Municipal Code, as amended by Ordinance No. 90,500, it was provided that the City Planning Commission of the City of Los Angeles might

authorize the use of any lands within the City of Los Angeles for the purpose of the development of natural resources, and if such use was expressly authorized that the same should be deemed in accordance with the master plan. The applicable provisions of Section 12.24 of the Los Angeles Municipal Code are set forth in paragraph VII of this answer, and the same are hereby referred to and made a part of this second, separate and affirmative defense to the same extent as though the same were fully set forth at this point.

Pursuant to the procedure prescribed by said section, on June 2, 1946, this defendant filed an application with the City Planning Commission of the City of Los Angeles, requesting that he be granted a conditional use permit authorizing him to use the lands described in paragraph I of plaintiffs' complaint for the purpose of mining for rock, sand and gravel thereon. Thereafter, and after notice duly given, the City Planning Commission held a public hearing, at which time those opposing and those favoring the granting of the application were allowed in excess of our hour each to present their case. That on said date the Planning Commission took the matter under submission and on July 25, 1946, denied the application of this defendant.

III.

On August 1, 1946, this defendant, pursuant to the provisions of Subdivision C of Section 12.24 of the Los Angeles Municipal Code, filed his appeal

to the City Council. The City Council referred it to its duly constituted City Planning Committee, and on September 26, 1946, [163] after notice duly given, said City Planning Committee held a public hearing on the application, and thereafter made its findings and report to the City Council in the words and in the figures set forth in the minutes of the Council of the City of Los Angeles dated October 2, 1946, a copy of which said minutes are attached hereto and marked Exhibit "B," and on October 2, 1946, the City Council of the City of Los Angeles, by a vote of eleven of its members, adopted the report of its City Planning Committee and granted to this defendant its application for a conditional use permit, under the terms and conditions recited in the minutes of the City Council as of October 2, 1946.

IV.

That this defendant will conduct operations for the mining of rock, sand and gravel in strict accordance with the provisions and conditions of said permit.

V.

That the lands described in paragraph I of plaintiffs' complaint are located in a zone where mining for rock, sand and gravel is permitted, and was expressly authorized by the action of the City Council on October 2, 1946. That the use which defendant will make of this property is a com-

mercial use, and his operations will be only such as are reasonable and necessary for the operation of his business, and under the terms and conditions recited in the permit issued by the City Council on October 2, 1946. That such operations will not constitute a nuisance, and that he will not employ any unnecessary or injurious methods in said operations.

Wherefore, this defendant prays that plaintiffs take nothing by reason of this action; that the same be dismissed; that this defendant recover his costs of suit herein incurred, and such other and further relief as to the court may seem meet and just in the premises. [164]

HOLBROOK & TARR and
CLYDE P. HARRELL, JR.,
DONALD J. DUNNE,

By /s/ CLYDE P. HARRELL, JR.,
Attorneys for Defendant,
J. D. Gregg. [165]

EXHIBIT "A"

July 25, 1946.

City Plan Case 962

(Copy)

Mr. John M. Gregg
P. O. Box 110
Whittier, California

Re: Application for Conditional Use for the Excavation of Rock, Sand and Gravel on Wicks Street, Dronfield Avenue, Pendleton Street and Glenoaks Boulevard.

Dear Mr. Gregg:

The excellent arguments made by both applicant and protestants in this case have reduced the problem to the basic consideration of what use of the land in question best serves the public need.

After the fullest discussion, the City Planning Commission members are of the unanimous opinion:

1. That the highest and best use of the property in question is not that of excavating for gravel, sand and rock;
2. That, in view of reliable information to the effect that there are 451 acres of potential gravel beds in M-3 zoned land in the San Fernando Valley in which excavations have not yet been begun, there is at this time no

public necessity for extending the conditional use privilege under Section 12.24 of the Zoning Ordinance.

The granting of the request is therefore unani-
mously denied.

Very truly yours,

WM. H. SCHUCHARDT,
President. [166]

EXHIBIT "B"

Excerpt from Minutes of the Council of the City
of Los Angeles Meeting held October 2, 1946.
(Vol. 321, Pages 374-376, Inc. File No. 24473)

The Planning Committee reported as follows:

In the matter of communication from the City Planning Commission relative to appeal of John D. Gregg from the decision of said Commission in denying his application for conditional use for the excavation of rock, sand, and gravel on real property in the San Fernando Valley bounded generally by Wicks Street, Dronfield Avenue and its southerly extension, Pendleton Street and Glenoaks Boulevard, more particularly described in said application, as amended, of said communicant to the said Commission and known as City Plan Case No. 962.

In accordance with provisions of the zoning ordinance, your Committee conducted a public hearing on this matter whereat proponents and

opponents of the question were heard and although a considerable number of protests were filed, after careful consideration of all the facts presented and a study of same, it is our opinion that the said use should be permitted.

We therefore recommend in accordance with the requirements of the zoning ordinance that the Council make the following written findings of fact:

The Council finds that the findings of the City Planning Commission on which said Commission's decision was based denying this application were in error for the following reasons:

1. That the property involved is situated in a district, the character of which is unsuited for residential purposes.
2. That the land in question is composed of gravel beds and is primarily suitable only for production of sand, rock, and gravel. [167]
3. That the proposed use of this property is deemed essential to the public convenience and welfare and is in harmony with the various elements or objectives of the master plan.
4. That under the conditions to be imposed the proposed use would not be detrimental to surrounding developments and would not adversely affect individual property rights or interfere with the enjoyment of property rights of property owners in the vicinity or affect any legal right of such property owners.
5. While there are about 450 acres of rock bearing land in M-3 zones in the area only 23,000,000 tons are available to existing plant

facilities and this amount is not sufficient to meet public and private demand for rock aggregates.

We further find from the foregoing reasons that the public necessity, convenience, and general welfare require that this appeal be granted and the conditional use be permitted as requested subject to the following conditions:

1. That the applicant construct a 6-foot cyclone type mesh wire fence around the said property, including barbed wire on the top of said fence providing the Fire Department grants permission for same.
2. That no permanent plant building or structure be installed or maintained on said property and that all material excavated be mined by an electrically powered shovel and primary crusher and transported by a conveyor belt system running through a tunnel or tunnels under Glenoaks Boulevard to the plant now owned and operated by applicant, lying southwesterly of said Boulevard and processed at said plant.
3. That a setback line of fifty feet from all property lines and existing streets be maintained and that slopes of excavations be maintained at one foot to one foot.
4. That the area between all property lines or street line and 50 foot setback be screen planted progressively as excavations proceed.

We Further Recommend that permission be granted to said applicant to make such excavations

in Glenoaks Boulevard as may be necessary to install and house the necessary conveyor belts, such excavations to be made in accordance with specifications of and at the location approved by the Board of Public Works.

Mr. Rasmussen moved, seconded by Mr. Henry, that said report as read be adopted.

Mr. Warburton moved, seconded by Mr. Rasmussen, that twenty minutes be allotted to each side to present their case.

Which motion was adopted by a unanimous vote.

Thereupon Mr. John D. Gregg, appellant, addressed the Council and made a statement as to past operations of his company, and of the demand for rock and gravel at the present time.

Mr. Jackson Wheeler, home owner and representing other property owners, thereupon addressed the Council in opposition to granting the application.

Mr. Paul McMahon of the Board of Education, and Mr. George Hjelte of the Playground and Recreation Department, addressed the Council speaking in opposition to granting the permit owing to hazardous conditions that will be created.

Mr. Davies then moved, seconded by Mr. Warburton, that Mr. H. P. Cortelyou, Director of the Bureau of Maintenance and Sanitation, be requested to attend the Council session and speak upon the question.

Which motion was adopted by a unanimous vote.

While awaiting Mr. Cortelyou's attendance at the Council session, Mr. Henry moved, seconded by Mr. Rasmussen, that ten minutes be allotted to the appellant for rebuttal.

Which motion was adopted by a unanimous vote.

Whereupon Mr. Clyde Harrell, representing the appellant, and Mr. Robert Mitchell, President of the Consolidated Rock Products Company, again reiterated the necessity of granting the application.

Mr. Cortelyou then being present in the Council Chamber, addressed the Council stating that anything he might say was his own opinion as an individual and as Director of the Bureau of Maintenance and Sanitation and that he was not appearing in behalf of, or by authority of the Board of Public Works.

Mr. Cortelyou stated that if there is not a sufficient supply of aggregate in the San Fernando Valley available for use upon City work, it would be necessary to secure same from greater distances, which would necessarily increase the length of haul and undoubtedly increase the cost to the City.

Mr. Warburton then moved, seconded by Mr. Rasmussen, that further consideration of the matter be continued until the meeting of the Council to be held December 3, 1946, and in the meantime the City Engineer be instructed to make a survey of available supplies of rock and sand deposits in the San Fernando Valley and report thereon to the City Council.

Upon calling the roll the members voted as follows: Ayes—Messrs. Holland, Warburton and President Moore (3); Noes—Messrs. Austin, Bennett, Christensen, Cronk, Davenport, Davies, Harby, Henry, Rasmussen and Timberlake (10).

The President declared the motion to continue failed of adoption, and instructed the Clerk to call the roll on the adoption of the report of the Committee, and upon calling the roll the members voted as follows: Ayes—Messrs. Austin, Bennett, Cronk, Davenport, Davies, Harby, Henry, Holland, Rasmussen, Timberlake and President Moore (11); Noes—Messrs. Christensen and Warburton (2).

The President declared the committee report adopted.

State of California,
County of Los Angeles—ss.

J. D. Gregg, being first duly sworn, deposes and says: that he is one of the defendants in the entitled action; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ J. D. GREGG.

Subscribed and sworn to before me this 3rd day of January, 1947.

[Seal] /s/ STANLEY MATTHEWS,
Notary Public in and for the County of Los Angeles,
State of California.

Affidavit of Service by Mail—1013a, C. C. P.
State of California,
County of Los Angeles—ss.

Clyde P. Harrell, Jr., being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business/residence address is: 740 Rowan Bldg., Los Angeles 13, California; that on the 3rd day of January, 1947, affiant served the within Answer on the Attorneys for plaintiffs in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said plaintiffs at the residence/office address of said attorneys, as follows: Oliver C. Clark and Robert A. Smith, 818 Garfield Building, Los Angeles 14, Calif., and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Mail at Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed or/and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ CLYDE P. HARRELL, JR.

Subscribed and sworn to before me this 3rd day of January 1947.

[Seal] /s/ STANLEY MATTHEWS,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed Jan. 3, 1947.

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 522031.

JACKSON EARL WHEELER, et al.,
Plaintiffs,

vs.

J. D. GREGG, et al.,
Defendants.

Holbrook & Tarr and Clyde P. Harrell, Jr., 740 Rowan Building, Los Angeles 13, Calif., Michigan 2191; and Donald J. Dunne, 215 W. 7th Street, Los Angeles 14, Calif., Trinity 7036; and Guy Richards Crump, 458 So. Spring St., Los Angeles 13, Calif., Trinity 4152, Attorneys for Defendant John D. Gregg.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial in Department 15 of the above entitled Court, before Honorable Alfred L. Bartlett, Judge Presiding, on the 28th day of May, 1947, and was tried by said Court, without a jury, a trial by jury having been expressly waived by all parties, plaintiffs appearing by their attorney, Oliver O. Clark, Esq., and defendant J. D. Gregg appearing by his attorneys, Guy Richards Crump, Esq., Clyde P. Harrell, Jr., Esq. and Donald J. Dunne, Esq., and defendant City of Los Angeles appearing by Ray L. Chesebro, Esq., City Attorney of the City of Los Angeles, and

Thomas H. Hearn, Esq., Deputy City Attorney, and evidence both oral and documentary having been introduced on the issues raised by the complaint and answer, and the cause having been fully argued before the Court, and having been submitted by the parties, and the Court being fully advised in the premises, now makes its Findings of Fact and Conclusions of Law, as follows:

Findings of Fact

I.

That it is true that the City of Los Angeles is a municipal corporation organized and existing under and by virtue of a municipal charter.

II.

That it is true that defendant J. D. Gregg is the owner or lessee and in possession of that certain real property comprising approximately 115 acres of land situated in the City of Los Angeles, County of Los Angeles, State of California, described as follows, to wit:

Lots 1, 2, 4, 5, 6, 7, 13 and 14 in Block 19; the Easterly 150 ft. of Lot 12 in Block 8; Lots 4 to 9, inclusive, and Lots 15 to 19, inclusive, and Lots 21 and 22 and the Easterly 280 ft. of Lot 14 in Block 17; all of the Los Angeles Land & Water Co.'s Subdivision of a part of Maclay Rancho, as per Map recorded in Book 3 of Maps at Pages 17 and 18 in the office of the County Recorder of said County;

and that said land is colored in red and designated and referred to as the "Critical Area" upon that certain map marked Exhibit "A," which is attached to the complaint herein, and which land has also been referred to during the trial of this case as the "Permit Area."

III.

That it is true that said map marked Exhibit "A" and attached to said complaint is a substantially correct representation of the area covered thereby upon a scale of one inch to each 1,000 lineal feet thereof.

IV.

That it is true that the area enclosed on said map marked Exhibit "A" and attached to said complaint, by a red line [173] is not more than 3,000 feet from the various extremities of the said "Critical" or "Permit" area, and that said area is referred to in said complaint as the "Community" area; but that it is untrue that said area so enclosed on said map by said red line is in fact a "Community" area or any other area other than an arbitrary designation by said plaintiffs of a portion of the general area shown on said map.

V.

That it is true that some of the narrow parallel lines designated as a street upon said map are and have been for more than five years last past dedicated as a public highway; but the Court finds that certain of said streets so designated upon said

map are unimproved and are not presently being used as a public highway; that it is true that certain of said streets are paved highways but that it is also true that other of said streets are unpaved.

VI.

That it is true that the area shaded in green on said map and designated as a "Community Park" contains approximately 15 acres of land and ever since 1928 has been a public park maintained by the Park Department under the management of the Playground Commission of the City of Los Angeles; that the areas shaded in green on said map designated as a "School" contain about 4 acres and are and since 1942 have been a public kindergarten and public elementary grade school maintained by the Board of Education of the City of Los Angeles; that the area shaded in green upon said map and designated as "Community Chapel" and "Community Church" are places of public worship.

VII.

That it is not true that the area lying westerly of Randall Street and southerly of the southerly line of said "Community" area paralleling Glenoaks Boulevard is and ever since about February, 1933, has been zoned as an "M-3" district; that it is true [174] that said area for many years last past has been excepted from the terms of the Residential District Ordinances of the City of Los Angeles and that the said area was designated

as a "M-3" district under the terms of Ordinance No. 90,500 enacted by the City of Los Angeles on March 7, 1946, and which became effective on June 1, 1946, and at all times since said effective date said area has been and now is designated as a M-3 zone.

VIII.

That it is true that about the year 1934 defendant J. D. Gregg began, and subsequent thereto has accomplished, the excavation of rock, sand and gravel upon a tract of land comprising approximately 62 acres owned by him and lying within said "M-3" zone, the northeasterly boundary of which tract of land lies distant approximately 300 feet southerly from the southwesterly line of Glenoaks Boulevard; that it is true that said defendant J. D. Gregg has substantially exhausted the available supply of rock, sand and gravel from said tract of land save and excepting only from that portion of said tract which has been and is now being used by said defendant for stock piles and plant facilities; that it is true that said defendant Gregg maintains upon said land machinery, equipment and other facilities for the excavation and processing of rock, sand and gravel for the market.

IX.

That it is not true that all of the areas shaded in black upon said map are or upon October 2, 1946, were improved, occupied and used as family homes for human residence; that it is true that

some of said areas, and a substantial portion thereof, were for more than five years last past and now are so improved, occupied and used.

X.

That it is true that the lands shaded in yellow and designated as an "Unrestricted" area on said map lie within the [175] natural channel of the easterly branch of the Tujunga Wash and that said lands are and always have been unrestricted as to their use for the commercial production of rock, sand and gravel.

XI.

That it is true that during the year 1907 Los Angeles Land & Water Co., a corporation, was the owner and in possession of approximately 3,000 acres of land including the so-called "Community" area and the so-called "Unrestricted" area, and lands adjacent thereto; that it is true that in or about the year 1907 the said Los Angeles Land & Water Co. caused said lands to be surveyed but that it is untrue that the said lands were classified with respect to their natural adaptability for residential, horticultural or agricultural development and use or with respect to their natural adaptability for the commercial production of rock, sand and gravel; that it is true that said Los Angeles Land & Water Co., in or about the year 1907, did arbitrarily designate the lands lying within the so-called "Unrestricted" area as "Stone Lands"; and that it is true that the commercial production of rock,

sand and gravel was then and at all times since has been the highest, best and most valuable use to which the land arbitrarily designated as stone land, as aforesaid, was and now is adapted; that it is not true that a pit excavation in said so-called "Unrestricted" area is or ever was susceptible to refilling by the passage of water, rock, sand or gravel; that it is true that ever since the construction of Hansen Dam there has been substantially no passage of water over or upon the said so-called "Unrestricted" area.

XII.

That it is not true that the residential, horticultural or agricultural development of lands lying in the so-called "Community" area was, is or at any time has been the highest, best and most valuable use to which said lands are adapted; that it is true that some portion of said area is adaptable to residential [176] and agricultural development and is overlaid with a substantial stratum of sandy loam and is within an area of climatic conditions favorable for human residence and plant growth; but the Court finds it to be true that the highest, best and most valuable use to which other portions of said area are adapted, and particularly that area designated on said map as the "Critical" area is the commercial production of rock, sand and gravel and that such portions of said area so adapted are not overlaid with a stratum, several feet thick, of rich, sandy loam, but on the contrary are either devoid of any top soil or that said top soil is very

thin and not suitable for plant growth other than growth commonly known as desert growth; that the remaining allegations of paragraph III of plaintiffs' complaint are true.

XIII.

That it is true that during the year 1914 the Los Angeles Land & Water Co. executed a contract for the sale to Fernando Valley Development Company, a corporation, of approximately 2,200 acres of land, including the so-called "Community" area and that during the same year it executed and recorded in the office of the County Recorder of Los Angeles County a declaration by the terms of which the commercial production of rock, sand and gravel within or upon the lands described and referred to in said declaration was prohibited until after the year 1934; that it is true that said restrictions remained in force and effect for twenty years and until the year 1934; that it is true that said restrictions by their terms expired in the year 1934; that it is not true that all of the lands so restricted were best adapted to residential, horticultural or agricultural development and use, and that on the contrary it is true the highest, best and most valuable use of certain of said land so restricted was then and always has been and now is for the commercial production of rock, sand and gravel.

XIV.

That it is true that on or about the 16th day of February, 1916, [177] the defendant City of

Los Angeles enacted its Ordinance No. 33,761 N. S.; that it is true that the area described in said complaint as the so-called "Community" area was not a part of and did not lie within the corporate limits of the City of Los Angeles at the time said ordinance was adopted and that said area was not annexed to the City of Los Angeles until the year 1918; that it is true that said Ordinance No. 33761, as amended, remained in force and effect until superseded by Ordinance No. 74,140, enacted by the said City of Los Angeles and which became effective on or about October 27, 1934; that it is true that Ordinance No. 74,140 became effective on or about October 27, 1934, and superseded Ordinance No. 33,761 N. S. and all amendments thereto, but it is not true that said Ordinance 74,140 superseded all variances granted or exceptions from the terms of said Ordinance 33,761 N. S.

XV.

That it is not true that Ordinance No. 74,140 classified the lands which comprise said so-called "Community" area as adapted to residential development and use and it is not true that said ordinance prohibited the conduct of any operation within or upon said land for the commercial production of rock, sand and gravel; that it is true that said ordinance did designate the lands therein described and referred to and comprising the greater portion of the San Fernando Valley as a residential district and prohibited the use for purposes other than residential purposes unless and

until a variance for such other use was obtained pursuant to the terms of said ordinance or unless and until the lands proposed to be devoted to such other use were excepted from the terms of said ordinance by subsequent ordinances amendatory thereof or supplemental thereto; that it is true that said Ordinance 74,140 was adopted by the City of Los Angeles for the purpose of holding in status quo the uses to which land in the area therein described could be put until such time as a comprehensive survey could be completed by the City of Los Angeles [178] and a comprehensive zoning ordinance adopted; that it is true that said Ordinance 74,140 remained in force and effect until superseded by Ordinance 90,500, which became effective on or about June 1, 1946.

XVI.

That it is true that one, C. S. Smith, and one, William Evans, on or about August 24, 1934, made written application to the Planning Commission of the City of Los Angeles for a variance permit to conduct operations for the commercial production of rock, sand and gravel upon Lots 9 and 10 in Block 22 within the so-called "Community" area; that it is true that on or about July 7, 1936, Claire Schweitzer made a similar application covering Lots 5, 6, 7, 13 and 14 in Block 19 of said so-called "Community" area; that it is true that on or about August 5, 1936, H. I. Miller made similar application covering Lots 9 and 10 in Block 22 within said area; that it is true that on or about

July 7, 1936, Ray Schweitzer made similar application covering Lots 5, 6, 7, 13 and 14 in Block 19 within said area; that it is true that in or about the month of January, 1940, John D. Gregg made similar application covering a portion of Lots 12 and 24 in Block 18 within said area; that it is true that F. H. Haines in or about the month of March, 1941, made similar application covering Lot 7 in Block 20 within said area; that it is true that in or about the month of November, 1945, Sam and Pauline Katz made application to said Planning Commission for a variance permit to operate a riding academy at No. 9821 Stonehurst Avenue, lying within said area; that it is true that each and all of said applications, as aforesaid, were denied by the Planning Commission of the City of Los Angeles, and that it is true that in those instances in which an appeal was taken by the applicant to the City Council of the said City of Los Angeles, that said appeal was denied by said City Council; that it is true that about the year 1933 the City Council of the City of Los Angeles adopted Ordinance No. 72,855 [179] effective June 30, 1933, granting to Frank Lotito and John Lotito an exception from the residential district ordinance authorizing them to erect and maintain a winery upon that certain five-acre parcel of land marked "A" upon the map attached to plaintiffs' complaint and marked therein Exhibit "A" and that thereafter and in about the year 1933 West Coast Winery, Inc., a corporation, one of the plaintiffs herein, and successor in interest to the said Frank Lotito

and John Lotito, did construct and improve said premises by a large and substantial building with underground storage facilities at a cost of in excess of \$150,000.00, for operation as a winery and distillery and retail liquor store and that said West Coast Winery, Inc., a corporation, ever since has been and now is conducting thereon the business of a winery and distillery and retail liquor store; that said property of said West Coast Winery, Inc., is located in the so-called "Community" area and immediately adjacent to the so-called "Critical" area; that it is true that about the year 1932 the City Council of the City of Los Angeles adopted Ordinance No. 71,448 effective June 13, 1932, granting an exception from the said residential district ordinance for the construction and operation of an asphalt hot plant on Lot 18, Block 17 in the so-called "Critical" area; that it is true that on January 23, 1946, in Zoning Administrator Case No. 8847 a Zoning Administrator variance for the construction and maintenance of a stable located at 9883 Helen Avenue in the "Community" area situated across Art Street from the property of Plaintiff Jackson Earl Wheeler was granted and that at all times since said date the stable has been and is now being maintained on said premises.

XVII.

That it is true that about the year 1928 certain residents within and adjacent to said so-called "Community" area petitioned the Park Commission of the City of Los Angeles for an election for the

purpose of authorizing the issuance of bonds to acquire and improve certain land within said so-called "Community" area as a public recreation and assembly center, and that thereafter said election was held and said bond issue approved and the bonds thus authorized were issued and sold; that it is true that thereafter the City of Los Angeles purchased and improved as a place for public recreation that certain area designated upon Exhibit "A" attached to the complaint herein as the "Community Park"; that it is true that a portion of the principal sum of said bonds is unpaid and constitutes a lien on the lands owned by plaintiffs herein as well as upon other lands situated within the Municipal Improvement District organized pursuant to said election.

XVIII.

That it is not true that when the residents of the so-called "Community" area petitioned for said election and voted said bonds that they knew or that the facts were that the land holdings of the Los Angeles Land & Water Co. had been classified or restricted, except as has been hereinabove found to be true; and that it is not true that the City of Los Angeles by the enactment of its zoning ordinances had prohibited any extension within said so-called "Community" area of any operations for the commercial production of rock, sand and gravel, except to the extent and in the manner hereinabove found to be true; that it is true that prior to said election the said City of Los Angeles had by the

enactment of numerous and sundry ordinances granted exceptions from the zoning ordinances then in effect so as to permit the use of certain lands in and about the area covered by said zoning ordinances for purposes other than residential; that it is true that the lands lying within [181] said so-called "Community" area had been sold subject to the terms of the deed restrictions and zoning then in effect; that it is not true that the said so-called "Community" area was being developed or used solely as a residential area in reliance upon said restrictions or zoning; that it is true that said restrictions by their express terms expired in the year 1934.

XIX.

That it is not true that the residents of said so-called "Community" area would not have petitioned for said election or voted said bonds had not said residents understood or believed that such area would continue to be developed or used solely as a residential area within which operations for the commercial production of rock, sand, and gravel would be prohibited, and that it is not true that said residents so understood or believed; that it is true that the Municipal Improvement District organized as a result of said petition and election included within its boundaries not only the so-called "Community" area but also a much larger area consisting of lands surrounding and adjacent to said so-called "Community" area; that it is true that the recreational facilities established as aforesaid, have been

and now are maintained under the management and supervision of the Playground Commission of the City of Los Angeles and are patronized and used by the residents of said so-called "Community" area and others.

XX.

That it is true that prior to the year 1942 Los Angeles City Board of Education maintained the Remsen Avenue Elementary Grade School on Glenoaks Boulevard at the northeast corner of its junction with Truesdale Avenue; that it is not true that in the year 1942 residents, including the "Community" area residents, whose children attended said Remsen Avenue School, requested said Board of Education to abandon said school because of its proximity to prospective permissible operations for the commercial production of rock, sand and gravel, or the hazards to the pupils of said school incident to said operations or because of heavy trucking traffic or because of noise and dust incident to the production of rock, sand and gravel or trucking operations; that it is not true that said residents petitioned said Board of Education to establish a new school for said abandoned school; that it is true that said Remsen Avenue School was abandoned in about the year 1942 and that at said time the Stonehurst School was established on Stonehurst Avenue within said so-called "Community" area but said Remsen Avenue School was abandoned at the instance of the Board of Education in order that it and another small elementary school located in the same general

area might be combined into one larger school at the present site of the Stonehurst Elementary School, and for no other reason; that at the time when said school was abandoned it was not known to the residents of said area or to any other residents or to anyone whomsoever or to the members of the Board of Education of the City of Los Angeles, and it was not the fact that for more than 28 years immediately theretofore the owners or subdividers of the land lying within said so called "Community" area or the Planning Commission of the City of Los Angeles or the Playground Commission of the City of Los Angeles or the Board of Education of the City of Los Angeles or the City Council of the City of Los Angeles had declared or ever did declare or had maintained or ever did maintain any policy whatsoever of prohibiting within said so-called "Community" area any extension of operations for the commercial production of rock, sand and gravel; that it is not true that either or any of the owners or subdividers of said lands or the Planning Commission or the Playground Commission or the Board of Education or the City Council of the City of Los Angeles did encourage or ever has encouraged either by a policy of restriction or otherwise the development of said so-called "Community" area as a residential district either with a minimum risk of danger incident to heavy trucking traffic upon the highways or the proximity of pits excavated in the commercial production of rock, sand and gravel or otherwise or at all; that it is not

true that pits excavated in the commercial production of rock, sand and gravel are dangerous or attractive to children of kindergarten or elementary school grade ages; that it is not true that dust, dirt and noise customarily or inevitably results from the commercial production of rock, sand and gravel.

XXI.

That it is not true that at the time of the abandonment of said Remsen Avenue School the residents of said so-called "Community" area or the Board of Education or the Planning Commission or the Park Commission or the Playground Commission or the City Council of the City of Los Angeles knew, and it is not the fact, that the establishment and maintenance of places frequented by the public, including schools, playgrounds, churches, assembly halls or highways, was extremely inadvisable in a vicinity where pits were excavated or other operations conducted for the commercial production of rock, sand and gravel, either because of a hazard to the safety, well-being or comfort of the residents of such a community or to the children of said residents, or to any other person or persons whomsoever, or because the presence of such conditions would be prejudiciously attractive to such children or prejudicial to the general public welfare, health or safety, or otherwise or at all; that such conditions were not and are not prejudiciously attractive to children and are not prejudicial to the general public welfare, health or safety.

XXII.

That it is not true that the said Board of Education was ever informed by the City of Los Angeles that it was the permanent or any other policy of said City of Los Angeles to prohibit within the so-called "Community" area or to exclude therefrom any extension of any operation for the commercial production of rock, sand or gravel or to encourage the development or use of said so-called "Community" area for residential purposes.

XXIII.

That it is not true that said City of Los Angeles made any representations whatsoever either to the Board of Education or to the residents of the area served by said Remsen Avenue School or to the residents of the so-called "Community" area, and that it is not true that said Board of Education or any of said residents believed any representations of said City to be true; and that it is true the said Remsen Avenue School was not abandoned in 1942 because of or in reliance upon any representations of the City of Los Angeles regarding any permanent or other policy of said City of Los Angeles with respect to said "Community" area or otherwise, and that it is not true that said Stonehurst School was constructed or placed in use upon its present site on Stonehurst Avenue in said "Community" area in reliance upon any representations of the City of Los Angeles or any person or persons whomsoever.

XXIV.

That it is true that during the years 1945 and 1946 and prior thereto the City of Los Angeles made an extensive survey under its Master Plan of zoning of the area lying within the boundaries of said municipality in the San Fernando Valley; that said survey and study was made through the Planning Commission of said City of Los Angeles for the purpose of preparing and promulgating comprehensive zoning ordinances; that it is not true that the said Planning Commission, the Engineering Department, or the City Council, or the Mayor of the City of Los Angeles determined or concluded that the general public welfare, safety, comfort or convenience of the residents within said so-called "Community" area, or any other residents, either justified or required the restriction against any extension within said "Community" area of any operation for the commercial production of rock, sand and gravel; that it is true that during the period of said survey and the preparation of said comprehensive zoning ordinances, there was prepared by the staff of the City Planning Commission a tentative map of a portion of the San Fernando Valley, and that said map indicated thereon the zoning restrictions which the staff of said City Planning Commission believes best adapted to the several areas included within the boundaries of said map, and that during the period commencing about the month of July, 1944, and ending in the month of February, 1946, the so-called "Critical" or "Per-

mit" area was shown on said map as being zoned M-3; that it is true that under the comprehensive zoning ordinance then in preparation, Zone M-3 would and did permit the excavation for the commercial production of rock, sand and gravel; that it is true that the Planning Commission of the City of Los Angeles did give its express approval to the zoning of said "Critical" or "Permit" area as M-3 zone; that it is true that the Planning Commission during the month of December, 1945, ordered the tentative zoning of said "Critical" or "Permit" area to be changed to R-A, after having received a petition signed by approximately 140 residents of the Roscoe area protesting against the excavation of said so-called "Critical" or "Permit" area for the commercial production of rock, sand and gravel.

XXV.

That it is true that on or about the 7th day of March, 1946, the City Council of the City of Los Angeles enacted its Ordinance No. 90,500, which became effective June 1, 1946; that it is true that in and by Ordinance No. 90,500 the property lying within the so-called "Community" area was zoned R-A, which zoning allowed the use of said land for Residential-Agricultural purposes; that it is true that under said R-A zoning the production of rock, sand and gravel in the so-called "Community" area was prohibited; but it is true that Section 12.24 of said Ordinance No. 90,500 [186] did then provide and has always provided that the development of natural resources may be permitted in any zones

from which such development is otherwise prohibited by the terms of said ordinance, provided that the Planning Commission in the first instance, or the City Council of the City of Los Angeles on appeal, under the provisions of Section 12.32 of said ordinance finds that such use is deemed essential or desirable to the public convenience or welfare and is in harmony with the various elements or objectives of the Master Plan. [187]

XXVI.

That it is not true that either under or by reason of any encouragement derived from the natural adaptability of the land lying within the so-called "community" area to residential development or use or by reason of any restrictions imposed or maintained thereon, either by private restriction or governmental zoning, or otherwise, that said so-called "community" area developed by either steady or substantial growth or improvement, either up to October 2, 1946, or otherwise, or at all; that it is not true that said so-called "community" area either on said date or at any other date was or is predominantly or substantially a residential community; that it is true that said so-called "community" area contains a substantial number of homes of a substantial value and that a substantial number of residents reside therein, and that within the boundaries thereof there is an elementary grade school, public recreational facilities, church facilities, an American Legion Hall, a medical clinic, concrete paved

streets, water, gas and electrical facilities and transportation facilities; but that it is not true that any of said improvements were constructed or installed by reason of any encouragement derived from private restrictions or by governmental zoning.

XXVII.

That it is not true that either during the fifteen (15) years immediately preceding October 2, 1946, or at any other time, that the highest or most valuable use of said so-called "community" area, and more particularly, the so-called "critical" or "permit" area, was for residential use or development; that it is not true that during said period, or at any time, or at all, the market value of the land within said "community" area, or any part thereof, increased from Five Hundred Dollars (\$500.00) an acre to about Five Thousand Dollars (\$5,000.00) an acre, or to any other sum in excess of Twenty-five Hundred Dollars (\$2,500.00) [188] per acre, and some of said land has not substantially increased in market value at all; that it is true the assessed valuation of said land for public taxation has been substantially increased during the fifteen (15) years immediately preceding October 2, 1946.

XXVIII.

That it is true that during the year 1941, defendant John D. Gregg became president and manager of the Los Angeles Land and Water Company, a corporation, and ever since said date has been and

now is said president and manager of said corporation; that it is true that said defendant John D. Gregg owns a substantial interest in said corporation, to wit, that said defendant John D. Gregg owns approximately eight per cent (8%) of the outstanding capital stock of said corporation; but that it is not true that said defendant John D. Gregg owns a controlling interest in said corporation; that it is true that at the time said John D. Gregg acquired his interest in said corporation, he knew that the land lying originally within the so-called "community" area had been originally owned by said corporation and had been restricted by deed restrictions as to its use by said corporation, and that said restrictions by their terms expired in the year 1934; but that it is not true that said John D. Gregg knew when he acquired his interest in said corporation, and it is not the fact, that said corporation had classified said land or that the defendant City of Los Angeles had zoned said land solely for residential, horticultural or agricultural development and use, excepting that the said corporation had previously and in the year 1907 designated certain adjoining lands as "stone lands," and excepting that the City of Los Angeles had previously included the so-called "community" area within the terms of the Residential District Ordinance as hereinabove set forth along with the greater portion of that area of the San Fernando [189] Valley lying within the boundaries of the City of Los Angeles.

XXIX.

That it is true that during the period of about five (5) years immediately preceding the commencement of this action, defendant John D. Gregg acquired by purchase or by lease in separate parcels and at several different times the land which comprises about one hundred and fifteen (115) acres and constitutes the so-called "critical" or "permit" area as shown upon the map; that it is not true that when said defendant John D. Gregg acquired each, or any parcels of land, that he knew, and it is not the fact, that said land had in 1914, or at any other time, been classified by the Los Angeles Land and Water Company as best adapted to residential, horticultural or agricultural development or use; that it is true that said defendant John D. Gregg did know that said land by deed restrictions executed in the year 1914 by the Los Angeles Land and Water Company had been restricted against the excavation of rock, sand and gravel; and that it is also true that said defendant John D. Gregg knew that said restrictions by their terms had expired in the year 1934; that it is true that said defendant John D. Gregg did know that certain zoning ordinances applicable to said land had been enacted by the City of Los Angeles prior to the year 1946; that it is not true that said defendant John D. Gregg knew of six (6) applications having been made to the City of Los Angeles for a variance permit to conduct operations for the commercial production of rock, sand and gravel within said so-called "community"

area, or within said so-called "critical" area, or that said applications had been denied, or that he had any knowledge of any applications or denials thereof whatsoever, saving and excepting one (1) application made by defendant John D. Gregg in the year 1940 covering a portion of Lots 12 and 24 in Block 18, and also excepting an application for such variance filed by one Schwitzer; that it is [190] true that when defendant John D. Gregg purchased said land, he knew, and the facts were, that within said "community" area there existed certain homes, schools, churches and a public park with recreational facilities; but that it is not true that said defendant John D. Gregg knew, and it is not the fact, that such homes, schools, churches, parks or recreational facilities were developed, built or maintained either in reliance upon such restrictions or in reliance upon the permanency of zoning; that it is not true that any paved highways, kindergarten, elementary grade school facilities, community recreational and park facilities, American Legion Hall, medical clinic, transportation facilities, public utility facilities or fire protection facilities were constructed established or maintained in reliance upon any deed restrictions or zoning regulations; that it is not true that the intrinsic value or market value or assessed value for purposes of taxation of any of the lands within the so-called "community" area had substantially or otherwise appreciated, or that said lands ever were in substantial demand for residential development or use in consequence of any deed restrictions or zoning regulations.

XXX.

That it is not true that at the time the defendant John D. Gregg purchased the first parcels of the land acquired by him in the so-called "critical" area that he intended to apply to the City of Los Angeles for a variance permit to enable him to excavate said lands for the commercial production of rock, sand and gravel; but that it is true that when said defendant John D. Gregg subsequently purchased other parcels of said land that he did intend to apply for such variance permit; that it is true that said John G. Gregg did not purchase all of said lands in his own name; that it is true that said John D. Gregg caused certain of said lands to be purchased in the name of Title Insurance and Trust Company, a corporation, as trustee, and caused other parcels to be purchased [191] in the name of his attorney, Donald J. Dunne; that it is not true that he secretly contracted for said land, or that he concealed from the vendors of said land at the time of such purchase, his intention to apply for a variance permit to enable him to conduct operations for the commercial production of rock, sand and gravel; that it is not true that said defendant John D. Gregg, or any of his agents, attorneys, or employees, either actively or otherwise, encouraged any of said vendors to believe that said purchases were being made for the purpose of developing and using said lands for residential purposes; that it is not true that any of said vendors would not have sold his said land to defendant John D.

Gregg if said vendors, or any of them, had known that the said land was being purchased for the benefit of said defendant Gregg, or that he intended to apply for such variance permit.

XXXI.

That it is not true that when defendant John D. Gregg purchased said lands comprising said so-called "critical" area, or at any other time, he knew, and it is not true that the facts then were, or ever have been, or now are, that any substantial operation upon said land within the so-called "critical" area for the commercial production of rock, sand and gravel would create or constitute a substantial or serious or dangerous hazard or detriment either to the general public welfare or the health or the safety either to the inhabitants of the so-called "community" area or otherwise, or that said operations would substantially or materially or at all interfere with or interrupt or disturb or impair the use or comfortable enjoyment of the properties within said so-called "community" area either by the owners or by the inhabitants of said properties, or any of them, or that such operations would substantially or otherwise depreciate either the intrinsic value or the reasonable market value of any of the lands lying within said area, or would create a reasonable [192] or any apprehension that, or that such operations would eventually, or at all, result in a substantial or any erosion of any highways abutting upon the so-called "critical" area, or of the lands abutting upon any highways immediately

opposite said "critical" area, or elsewhere, or that such operations would be prejudicial to the general public welfare or convenience or would not be in harmony with the various elements or objectives of the master plan of zoning of the City of Los Angeles.

XXXII.

That it is true that subsequent to the purchase by said defendant John D. Gregg of the parcels of land which now comprise the said so-called "critical" area and subsequent to the enactment of Ordinance 90500 of the City of Los Angeles and on June 2, 1946, the said Gregg did apply to the Planning Commission of the said City of Los Angeles for a conditional use permit under the provisions of Section 12.24 of said Ordinance 90500 authorizing him to conduct operations for the commercial production of rock, sand and gravel from and upon said lands which now comprise said so-called "critical" area; that it is true that in support of said application said defendant Gregg represented to the City of Los Angeles that the property constituting the so-called "critical" area was situated in a district, the character of which was unsuited for residential purposes, that said land was composed of gravel beds and was suitable primarily only for the production of rock, sand and gravel, that his proposed use of said land was in harmony with the various elements and objectives of the master plan of zoning as enacted by said City of Los Angeles; that while there were about three hundred and ten (310) acres of

rock-bearing land in the M-3 zone in the San Fernando Valley, that approximately only Twenty Three Million (23,000,000) tons were available to the then existing plant facilities, and that such tonnage was not sufficient to meet the demands [193] of the market in and about the City of Los Angeles for rock aggregates for any reasonable period of time, and that the public necessity, convenience and general welfare required that said permit be granted; that it is true that said defendant John D. Gregg represented to said City of Los Angeles that his proposed use of said lands would not be detrimental to the developments surrounding the lands as to which said permit was sought, or that it would not adversely affect individual property rights of property owners in the vicinity of said "Critical" area or affect any legal rights of any such property owners; that the Court further finds that the proposed use of said lands by said defendant John D. Gregg in accordance with the said Conditional Use Permit issued to him pursuant to said application, will not adversely or otherwise affect individual property or legal rights of any property owners in the vicinity of the said "Critical" area, or elsewhere.

XXXIII.

That it is not true that when said application was made by said defendant John D. Gregg, that it was a fact, or a matter of public record or of common knowledge or that defendant John D. Gregg knew that since the year 1935, twenty children, or any

greater number of children than three, had accidentally lost their lives in gravel pits in the San Fernando Valley created by the commercial production of rock, sand and gravel, or that more than one child had sustained serious, or any other injuries in said pits.

XXXIV:

That it is not true that on August 20, 1946, the Planning Commission of the City of Los Angeles denied said application of John D. Gregg, that it is true that after a public hearing, the Planning Commission on July 25, 1946, did, by unanimous vote of its members, deny said application; that it is not true that said Planning Commission found as a fact, but that it is true that said [194] Planning Commission, pursuant to the request of the City Council made under the provisions of Section 12.32e of Ordinance Number 90500, did on August 20, 1946, inform said City Council in writing that the reasons why the Planning Commission had denied said application were as follows:

“1. That the property in question can be utilized for residential purposes as evidenced by the residential development in the immediate neighborhood and, hence, the present ‘RA’ zoning is appropriate for the property and general area.

2. Protests filed by a substantial number of property owners in the vicinity against the requested use indicate that it would interfere with a reasonable enjoyment of their homes and community facilities.

3. That the extensive excavations and pits left after operations have been completed create an unsightly and dangerous condition which is detrimental to the public welfare, particularly from the standpoint of safety and, in addition, leaves the land in a condition unsuited for a use in keeping with others in this community.

4. That it was not shown conclusively that public convenience would be best served by permitting the extension of operations onto the subject property. On the contrary, the Commission feels that to permit the creation of a condition such as that referred to above would adversely affect individual property rights and interfere with the normal growth of this community, thereby conflicting with the objectives of the Master Plan.

5. From the best information available, the Commission finds that there are approximately 450 acres of [195] potential rock and gravel deposits in the M3 zone which are located in the immediate vicinity and wherein the use requested is permitted as a matter of right. It is stated by the applicant that this M3 zoned area includes 310 net acres.”

That it is not true that the Planning Commission found or gave as a reason for the denial of said application that the then existing zoning which prohibited the commercial production of rock, sand and gravel, from or upon the lands as to which such permit was sought was an appropriate zoning for

said property or for the general area in which such property was situated, or that the proposed use of said lands would interfere with a reasonable enjoyment by a substantial number of property owners in that vicinity of their homes or community facilities.

XXXV.

That it is true that after the denial of his said application for said conditional use permit, the said defendant John D. Gregg did appeal to the City Council of the City of Los Angeles from the denial by said City Planning Commission of his said application, and it is true that on October 2, 1946, the said City Council of said City did grant said application and did grant said John D. Gregg a conditional use permit authorizing him to excavate upon said so-called "critical" area for the commercial production of rock, sand and gravel; and that it is true that said permit was granted upon the following conditions, to wit:

1. That the applicant construct a 6-foot cyclone type mesh wire fence around the said property, including barbed wire on the top of said fence providing the Fire Department grants permission for same.

2. That no permanent plant building or structure be installed or maintained on said property and that all material excavated be mined by an electrically powered [196] shovel and primary crusher and transported by a conveyor belt system running through a tunnel or

tunnels under Glenoaks Boulevard to the plant now owned and operated by applicant, lying southwesterly of said Boulevard and processed at said plant.

3. That a setback line of fifty feet from all property lines and existing streets be maintained and that slopes of excavations be maintained at one foot to one foot.

4. That the area between all property lines or street lines and 50 foot setback be screen planted progressively as excavations proceed.

XXXVI.

That it is true that Ordinance No. 90500 was adopted by the City Council of the City of Los Angeles on March 7, 1946, and that said permit was granted by the Council by an affirmative vote of eleven (11) of the members thereof; that it is not true that the City Council at the time it adopted Ordinance No. 90500 found or determined upon an exhaustive re-survey or study of zoning planning in the San Fernando Valley, or at all, that the conditions or developments within said "community" area justified or required for the promotion of general welfare, the preservation of the public health or safety, the protection of property rights, or otherwise, that the extension of any operations for the commercial production of rock, sand or gravel should be prohibited; that it is not true that no change of any character occurred between the date of the adoption of the Ordinance No. 90500 and the

date of granting said conditional use permit, or between the enactment of zoning ordinances adopted in the City of Los Angeles in 1916 and 1946 respectively; that it is not true that the general public welfare or safety of the inhabitants of the "community" area in which said "critical" area is located or the preservation of [197] property rights of the property owners in such "Community" area required a prohibition or a continuance of a prohibition of such operation within the "Community" area.

XXXVII.

That it is not true that the granting of such Conditional Use Permit in any way adversely affected the Master Plan of zoning of the City of Los Angeles as defined by Ordinance No. 90,500.

XXXVIII.

That it is not true that the conduct of the eleven (11) members of the City Council of the City of Los Angeles who voted in favor of granting said Conditional Use Permit on October 2, 1946, was either arbitrary or unreasonable or unfair or capricious or farcial; that it is not true that about one and one-half hours of the time of said session of said City Council was allotted by said City Council to said John D. Gregg; and that it is not true that barely twenty minutes were allowed to the opponents of said application, including plaintiffs in this action and the representatives of the Board of Education and Playground Commission of said

City; that it is true that the City Council allotted to John D. Gregg a period of thirty minutes to present his case and an equal amount of time, to-wit, thirty minutes to the opponents to present their case; that it is not true that the attitude, conduct or votes of any of said eleven (11) members of said City Council, is or was inexplicable upon any rational grounds; and that it is not true that the attitude, conduct or votes of said eleven (11) members of said City Council ever was or now is utterly or at all repugnant to the concept or objectives of the Master Plan of zoning of the City of Los Angeles or subversive to the public welfare or health or safety or the property rights of the land owners or residents within said so-called "Community" area, including the plaintiffs in this action, or any other person or persons whomsoever. [198]

XXXIX.

That it is not true that there did not exist at the time that said application was made, or that there does not now exist, or that there ever has existed any necessity either public or private for the commercial production of rock, sand or gravel, from or upon the lands which comprise the so-called "critical" area; that it is not true that the use of said property for the excavation of rock, sand and gravel is not and has not been essential or desirable to the public convenience or welfare; that it is not true that the said use of said property is not in harmony with the various elements or objectives of the Master Plan of zoning of the said City of Los Angeles.

XL.

That it is not true that there is now and for many years last past has been an adequate available quantity of commercial rock, sand and gravel in the natural deposits of said materials in the area of Los Angeles County wherein the commercial production thereof is permissible and economically feasible to supply all of the needs and demands for said materials; that it is not true that the permanent prohibition of the excavation upon the so-called "critical" area for the commercial production of rock, sand and gravel would not create any material shortage in the available quantity of said material in any market available for said material; that it is not true that such prohibition would not tend to deprive any potential consumer of such material of the supply of such materials adequate to satisfy the needs of such consumer; that it is true that the rock plant now being operated by John D. Gregg in the area immediately southerly in the so-called "critical" area is now producing and for many years last past has produced approximately thirty-five per cent (35%) of all of the rock, sand and gravel which is and has been produced from the San Fernando gravel cone; that it is true that the said John D. Gregg [199] has substantially exhausted the supply of such materials which are available for excavation from his said property lying outside of the so-called "Critical" area; that it is true that if the said John D. Gregg is denied the right to excavate for the commercial production of rock, sand and gravel from the area within the so-called

“Critical” area that the said defendant John D. Gregg will be forced within a short period of time to suspend the operations of his said rock plant lying southerly of Glenoaks Boulevard which would deprive the consumers of such materials who are most economically supplied from the San Fernando gravel cone, of approximately thirty-five per cent (35%) of their requirements; that it is true that there are no plant facilities available in the San Fernando Valley of sufficient capacity to supply any portion of said deficit of thirty-five per cent (35%) of rock, sand and gravel to the market, which said rock plant of said John D. Gregg is now capable of processing for the market;

That it is not true that at the time said application of said John D. Gregg was made and that it is not true that there has been at all times since and now are substantial or any stock piles of processed materials in the processing plants in the San Fernando Valley for which there has not been, and is not now, any market demand; that it is true that the only stock piles at the processing plants in the San Fernando Valley are those which are ordinarily and necessarily maintained incident to the daily operation of such plants.

XLI.

That it is true that defendant John D. Gregg intends to immediately begin the excavation for the commercial production of rock, sand and gravel from the land which comprises the so-called “Critical” area; that it is not true that said defendant John D. Gregg intends to excavate said “Critical”

area to a depth of One Hundred Fifty feet (150'), or to any other depth in excess of One Hundred feet (100'); that it is true that said defendant John D. [200] Gregg, pursuant to the terms of said conditional use permit, intends to excavate said area with a side wall slope of not more than one horizontal foot for each vertical foot of depth, and that the said Gregg intends to and will maintain a setback of not less than fifty feet (50') from the exterior property lines and existing streets bounding the said so-called "critical" area; that it is not true that the structure or the placement of the materials that compose said lands are such that there is a reasonable probability or expectancy that in the course of time by natural processes of erosion or otherwise, that the side walls of a pit on said "critical" area at its upper surface would recede so that the said pit would substantially or at all encroach upon any public streets or upon any of the lands which now bound said so-called "critical" area, or upon the lands abutting upon streets opposite the lands which comprise said so-called "critical" area or upon any other lands whatsoever.

XLII.

That it is not true that any operation in the excavation of rock, sand or gravel within or upon the so-called "critical" area would necessarily, either frequently or daily, or at all, pollute the air with dust or dirt, or that any dust or dirt emanating from said "critical" area, either in substantial or obnoxious quantities, would be carried by the

winds to the property of plaintiffs, or of any other persons within the so-called "community" area, or would be deposited upon said properties, or any of them, or in the homes or upon the persons of said plaintiffs, or any other persons; that it is not true that any pollution of the air or deposits of dust or dirt, either upon the properties or persons or within the homes of said plaintiffs or any other persons, will be a natural or necessary consequence of any excavation within or upon said lands for the commercial production of rock, sand and gravel; that it is not true that any operations [201] upon said "critical" area for the commercial production of rock, sand and gravel would constitute either a dangerous or an obnoxious or a deleterious condition either upon the premises of plaintiffs or upon any other persons or upon the highways or in places of public gathering or within the said "community" area or elsewhere, or would substantially or at all deprive said plaintiffs or any other persons of any right to enjoy, or the enjoyment of their properties or homes or highways or places of public gathering, either within said "community" area or elsewhere.

XLIII.

That it is not true that the excavation of rock, sand and gravel on a commercial scale within or upon said critical area would, as a natural or necessary consequence thereof, produce loud or rasping or obnoxious noises; that it is not true that the operations in excavation of rock, sand and gravel on a commercial scale would produce noises which

would necessarily penetrate to the properties or homes of plaintiffs or to other persons similarly situated in the "community" area, or would substantially or materially disturb plaintiffs or any of them, or any other persons in their respective use or enjoyment of their property or properties or homes or would substantially impair or diminish their enjoyment respectively of their properties or homes or highways or places of public assembly within said "community" area or elsewhere.

XLIV.

That it is not true that any commercial production of rock, sand and gravel within said "critical" area or any other place would as a natural consequence thereof substantially depreciate the intrinsic value or market value of any or all of the lands within said "community" area outside of said "critical" area, or any other place. [202]

XLV.

That it is true that each of the several named plaintiffs referred to in paragraph XXVII of plaintiffs Complaint are the owners of the parcels of land which they are alleged to own in said paragraph and were the owners of said parcels of land, and that said land was improved and used as alleged in paragraph XXVII of said complaint.

XLVI.

That it is not true that this action was brought or maintained on behalf of the planning Commis-

sion, the Park Department, Playground and Recreational Department and Board of Education or any of said departments of defendant City of Los Angeles.

XLVII

That it is not true that residents within said "Community" area were and for more than five (5) years last past, or at any other time, have been more than one thousand (1,000) persons, or any other numbers who are not named as plaintiffs herein, who in the enjoyment of their homes in said "Community" area or in their health or safety would be substantially or materially or wilfully or otherwise affected by any operation of commercial production of rock, sand and gravel within or upon the "Critical" area; that it is true that a substantial number of persons object to the commercial production of rock, sand and gravel within the "Critical" area. [203]

XLVIII.

That it is not true that said so-called "Community" area for more than one year continuously preceding the grant of said Conditional Use Permit was under extensive development for the sub division, improvement or use thereof for residential uses and purposes; that it is not true that continuously for more than one year immediately preceding the grant of said Conditional Use Permit or at any other time, or at all, that there was a heavy or continuing or any demand for residential lots within the said so-called "Critical" area for residential improvement or use.

XLIX

That it is not true that the said "Community" area at any time subsequent to the year 1934 has been restricted against any extension therein of any operation for the commercial production of rock, sand and gravel; that it is not true that plaintiffs, or any of them, acquired his or their premises in reliance upon any knowledge or belief that the so-called "Community" area would be developed or improved or used as a predominantly residential area or would remain immune to any encroachment therein or thereupon of any operation for the commercial production of rock, sand and gravel; that it is not true that there was or is any general policy or ever was any general policy established or maintained by the City of Los Angeles for any such improvement, development or use; that it is not true that Los Angeles Land & Water Co. ever did actively encourage any of the plaintiffs to acquire, improve or use their said property for residential purposes.

L.

That it is true that some of the lands lying within the so-called "Critical" area are substantially the same in structure and placement of the materials of which they are composed or in their top soil condition or in their surface [204] contour as the lands of plaintiffs, but this is not true as to other lands in said area.

LI.

That it is not true that the operation of a primary crusher upon said so-called "Critical" area will produce loud crunching, rasping or obnoxious noises or substantial quantities of dust or dirt; that it is not true that by reason of said primary crusher operation that substantial or any quantities of dust or dirt will be carried by the winds to the homes of the inhabitants of said so-called "Community" area or to schools, churches or other places of public or private assembly within said "Community" area, or will substantially or materially or at all interfere with, interrupt or impair the comfortable enjoyment of plaintiffs' homes or other places of assembly; that it is not true that a substantial or any part of any dust or dirt from said "Critical" area will consist of a granular silica in powdery or other form; that it is not true that any dust or dirt from said so-called "Critical" area is or will be conducive to the development or aggravation of tuberculosis or other respiratory or pulmonary afflictions; that it is not true that screen planting upon the margins of said so-called "Critical" area will be either a sham or a farce; that it is not true that said screen planting would attract or cause the death or injury of children.

LII.

That it is not true that any conduct of the City of Los Angeles either in the exercise of its police power or otherwise in respect of the granting of said Conditional Use Permit was or is oppressive or

discriminatory; that it is not true that said City of Los Angeles either on October 2, 1946, or at any other time, granted to John D. Gregg a special right or privilege denied to other property owners; that it is not true that the act of said City of Los Angeles in granting said Conditional Use Permit was or is in excess of the limits of its police power or was or is in [205] violation of Article 1, Section 21 of the Constitution of the State of California or of the Constitution of the United States; that it is not true that said act was or is void.

LIII.

That it is not true that the granting of said Conditional Use Permit to John D. Gregg constitutes or ever did constitute the taking of any of the property of plaintiffs or any persons whomsoever.

LIV.

That it is not true that the granting of said Conditional Use Permit was or is either an unjust or oppressive or arbitrary exercise of the police power or was or is an unwarranted or any invasion or confiscation of either the property or property rights of said plaintiffs or any other persons.

LV.

That it is not true that the granting of said Conditional Use Permit bears no relation to the ends for which the police power exists; that it is not true that the granting of said permit was or is an invasion of any personal or property rights of said plaintiffs or any other persons.

LVI.

That it is not true that the granting of said Conditional Use Permit was for the purpose of preferring John D. Gregg against any other property owners; that it is not true that only about 35 acres of the property owned by John D. Gregg lying southwesterly of Glenoaks Boulevard has been excavated; that it is not true that said John D. Gregg is or for more than five months prior to the commencement of this action has been or ever was or now is the owner or in control of any unexcavated land situated within the San Fernando Valley other than the land located within the said so-called "Critical" area and his plant and stockpile site southwesterly of Glenoaks Boulevard.

LVII.

That it is not true that operations for the commercial production of rock, sand and gravel within said so-called "Critical" area will substantially or materially or seriously or at all disturb, interfere with, interrupt or diminish the enjoyment by plaintiffs or any other persons of their properties within said so-called "Community" area or will injure or damage such properties.

LVIII.

That it is not true that operations for the commercial production of rock, sand and gravel within said "Critical" area will substantially or materially or at all depreciate the reasonable market value of the properties of plaintiffs or any other persons or that such properties will be substantially de-

stroyed or that said plaintiffs or any other persons will be irreparably or permanently damaged, or damaged at all.

LIX.

That it is not true that defendant John D. Gregg is estopped to claim or exercise his rights and privileges under the terms of said Conditional Use Permit or that he is estopped to conduct operations in said so-called "Critical" area for the commercial production of rock, sand or gravel.

LX.

That it is not true that the City of Los Angeles either by its conduct as alleged in said complaint or otherwise, or at all, is or ever was estopped to grant said Conditional Use Permit or to permit said John D. Gregg to exercise or enjoy any benefit, right or privilege under said Conditional Use Permit or to authorize or permit the operation for the commercial production of rock, sand or gravel within said "Critical" area or any place within said so-called "Community" area.

LXI.

That it is not necessary that either the City of Los [207] Angeles or John D. Gregg be permanently or at all enjoined from authorizing or conducting operations for the commercial production of rock, sand or gravel in said "Critical" area either to prevent wrong or injustice or otherwise or at all; that it is not true that the grant of said Conditional Use Permit is or ever was in excess of the exercise of the police power of the City of Los Angeles.

LXII.

That it is not true that by reason of any conduct of John D. Gregg the occupancy by plaintiffs of their homes has been rendered substantially or materially uncomfortable or that the enjoyment of said properties has been or is substantially, materially or grievously or at all interfered with or impaired by reason of any conduct of said Gregg; that it is not true that plaintiffs have been damaged in the sum of \$100,000.00 or in any other sum.

LXIII.

That it is not true that any conduct of John D. Gregg has been, is or ever was oppressive, fraudulent or malicious; that it is not proper that punitive damages in the sum of \$250,000.00 or any other sum be assessed against defendant John D. Gregg.

LXIV.

That it is true that on March 7, 1946 the City of Los Angeles enacted Ordinance No. 90,500, which said ordinance became effective on June 1, 1946; that it is true that Section 12.24 of Ordinance No. 90,500 provides in part as follows:

“A. Location of Permitted Uses—Wherever it is stated in this Article that the following uses may be permitted in a zone if their location is first approved by the Commission, said uses are deemed to be a part of the development of the Master Plan or its objectives and shall conform thereto. Before

the Commission makes its final determination a public hearing by the Commission shall be mandatory for certain uses and optional for others:

“1. Uses for which at least one public hearing shall be held include: airports or aircraft landing fields; cemeteries; educational institutions; and golf courses (except driving tees or ranges, miniature courses and similar uses operated for commercial purposes).

“2. Uses for which a public hearing is optional include: churches (except rescue mission or temporary revival); schools, elementary and high; and public utilities and public service uses or structures.

“B. Additional Uses Permitted—The Commission, after public hearing, may permit the following uses in zones from which they are prohibited by this Article where such uses are deemed essential or desirable to the public convenience or welfare, and are in harmony with the various elements or objectives of the Master Plan:

“1. Airports or aircraft landing fields.

“2. Cemeteries.

“3. Development of natural resources (excluding the drilling for or producing of oil, gas or other hydrocarbon substances) together with the necessary buildings, apparatus or appurtenances incident thereto.

“4. Educational institutions.

“5. Governmental enterprises (federal, state and local).

“6. Libraries or museums, public.

“7. Public utilities and public service uses or structures. * * *

“C. Procedure—Written applications for the approval of the uses referred to in this Section shall be filed in the public office of the Department of City Planning upon [209] forms prescribed for that purpose by the Commission.

“The procedure for holding public hearings shall be the same as that required in Sec. 12.32-C.

“The Commission shall make its findings and determination in writing within forty (40) days from the date of filing of an application and shall forthwith transmit a copy thereof to the applicant. No decision of the Commission under this Section shall become effective until after an elapsed period of ten (10) days from the date the written determination is made, during which time the applicant, or any other person aggrieved, may appeal therefrom to the City Council in the same manner as provided for in Sec. 12.32-E.

“In approving the uses referred to in this Section, the Commission shall have authority to impose such conditions as are deemed necessary to protect the best interests of the surrounding property or neighborhood and the Master Plan.”

LXV.

That it is true that on June 2, 1946 defendant John D. Gregg filed an application with the Planning Commission of the City of Los Angeles requesting that said Planning Commission grant to him a Conditional Use Permit authorizing him to use the property situated within the so-called "Critical" area for the commercial production of rock, sand and gravel; that it is true that after a public hearing held by the said City Planning Commission on June 20, 1946, that said Commission on July 25, 1946 denied defendant John D. Gregg's application for a Conditional Use Permit; that it is true that thereafter and on August 1, 1946, defendant John D. Gregg appealed pursuant to the provisions of Subsection C of said Section 12.24 to the City Council of said defendant City of Los Angeles from said denial by the said City Planning [210] Commission of said application; that it is true that after a public hearing duly held on September 26, 1946, before the Planning Committee of the City Council of Los Angeles, and after a further hearing before the City Council of said City as a whole, that said City Council did on October 2, 1946, by a vote of eleven of its members, adopt the written Findings and Report of the said Planning Committee, as set forth in Exhibit "B" attached to the Answer of defendant Gregg herein, and did grant to said defendant Gregg a Conditional Use Permit for the commercial production of rock, sand and gravel from the so-called "Critical" area; that

it is true that the use which defendant Gregg will make of said property lying within said so-called "Critical" area is a commercial use and that his operations will be only such as are reasonable and necessary for the operation of said commercial use under the terms and conditions recited in the Conditional Use Permit issued by the City Council on October 2, 1946, and that said operations will not constitute a nuisance and that said Gregg will not employ any unnecessary or injurious methods in said operation.

LXVI.

That it is true that at the hearing before the Planning Committee of the City Council of Los Angeles on the appeal of John D. Gregg from the denial by the said City Planning Commission of his application for a Conditional Use Permit, that evidence both oral and documentary was introduced and that said evidence was and is of a substantial nature and character and was and is in support of the decision of the City Council of the City of Los Angeles in granting to defendant John D. Gregg the said Conditional Use Permit.

LXVII.

That it is true that during the trial of the within cause the said defendant John D. Gregg made certain representations to the Court, as follows:

1. That said defendant John D. Gregg will not conduct any operations in the so-called "Cri-

tical" area lying northeasterly of Glenoaks Boulevard during any hours of the night excepting such operations as might be reasonably necessary to effect repairs to equipment.

2. That said defendant John D. Gregg will house in the primary crusher which he will operate in the so-called "Critical" area lying northeasterly of Glenoaks Boulevard so as to minimize any noise emanating therefrom.
3. That in connection with any and all drag-line operations on the banks or slopes of the pit to be excavated in the so-called "Critical" area lying northeasterly of Glenoaks Boulevard, said defendant John D. Gregg will cause said banks or slopes to be sprinkled with water prior to any such drag-line operations so as to minimize the possibility of dust being carried by the winds beyond the outer boundaries of said so-called "Critical" area.
4. That said defendant John D. Gregg intends to and will as soon as is reasonably practicable, and as soon as material and equipment is available, complete the construction of the dust collection system in his rock crusher plant located southwesterly of Glenoaks Boulevard, the construction of which system was commenced prior to the commencement of this action.

Conclusions of Law

From the foregoing findings of fact the court makes the following conclusions of law:

1. All conclusions of law hereinbefore set forth as findings of fact.

2. Plaintiffs are not entitled to judgment against either of the defendants.

3. The conditional use permit granted defendant Gregg by the City Council of the City of Los Angeles was and is a valid [212] and subsisting permit issued pursuant to the provisions of Ordinance No. 90,500 of the City of Los Angeles.

4. The granting of said conditional use permit was not and is not an unconstitutional grant of a special privilege.

5. The granting of said conditional use permit was not and is not an unjust, oppressive or arbitrary exercise of the police powers of the City of Los Angeles, and was not and is not an invasion or confiscation of any of the properties or rights of plaintiffs or of any other persons.

6. The City of Los Angeles was not and is not estopped to grant said conditional use permit to defendant John D. Gregg, nor to permit or allow said John D. Gregg to conduct operations for the excavation of sand, rock and gravel from the so-called "Critical" area described in the complaint.

7. Defendant Gregg was not and is not estopped to exercise his rights under said conditional use

permit, or to conduct operations for the excavation of sand, rock and gravel within the so-called "Critical" area described in the complaint.

8. Said City of Los Angeles should not be enjoined from granting said conditional use permit or allowing or permitting John D. Gregg to conduct operations for the excavation of sand, rock and gravel from said "Critical" area described in the complaint, in accordance with the terms of said permit.

9. Defendant Gregg should not be enjoined from exercising his rights under said permit or from conducting operations for the commercial production of sand, rock and gravel within the so-called "Critical" area as described in the complaint herein.

10. That the plaintiffs, either collectively or otherwise, have not, nor have any of them, been damaged in any sum or sums of money whatsoever. Neither are the plaintiffs, nor any of them, nor anyone purported to be represented by them, entitled to recover any damages whatever from the defendants or either of them. [213]

11. Each of the defendants are entitled to recover their costs herein.

Let judgment be entered accordingly.

Dated this 10th day of September, 1947.

/s/ ALFRED L. BARTLETT,
Judge.

[Endorsed]: Filed Sept. 10, 1947. [214]

In the Superior Court of the State of California
 in and for the County of Los Angeles

No. 522031

JACKSON EARL WHEELER, PATRICK
 ADAMS, W. L. CALLEY, D. H. CALLEY,
 ARCHIE I. WAY, LILLIAN LEWIS, W. R.
 SHADLEY, G. T. WINKLER, DONALD
 KERSEY, CHARLES WISE, WILLIAM F.
 BORROWE, T. O. EASLEY, R. E. BER-
 TELL, BETSY ROSS, GEORGE J. KING,
 FRANK E. WRIGHT, B. R. FONDREN,
 ROBERT D. HOPKINS, FRANK LUTI-
 ZETTI, DWIGHT MOORE, LOUISE R.
 TAYLOR, FRANK J. SMYTHE, C. C.
 CAMPBELL, HELEN CHURCHWARD,
 PAUL C. BROWN, and WEST COAST
 WINERY, INC., a corporation,

Plaintiffs,

vs.

L. D. GREGG, and the CITY OF LOS ANGELES,
 a municipal corporation,

Defendants.

Holbrook & Tarr and Clyde P. Harrell, Jr., 740
 Rowan Building, Los Angeles 13, Calif., Michigan
 2191, and Donald J. Dunne, 215 W. 7th Street,
 Los Angeles 14, Calif., Trinity 7036, and Guy Rich-
 ards Crump, 458 So. Spring St., Los Angeles 13,
 Calif., Trinity 4152, Attorneys for Defendant, John
 D. Gregg.

JUDGMENT

The above entitled cause came on regularly for
 trial in Department 15 of the above entitled Court,

before Honorable Alfred L. Bartlett, Judge Presiding, on the 28th day of May, 1947, and was tried by said Court, without a jury, a trial by jury having been expressly waived by all parties, plaintiffs appearing by their attorney, Oliver O. Clark, Esq., and defendant J. D. Gregg appearing by his attorneys, Guy Richards Crump, Esq., Clyde P. Harrell, Jr., Esq., and Donald J. Dunne, Esq., and defendant City of Los Angeles [215] appearing by Ray L. Chesebro, Esq., City Attorney of the City of Los Angeles, and Thomas H. Hearn, Esq., Deputy City Attorney, and evidence both oral and documentary having been introduced on the issues raised by the complaint and answer, and the cause having been fully argued before the Court, and having been submitted by the parties for decision, and after deliberation thereon, the Court having filed herein its Findings of Fact and Conclusions of Law in writing, and the Court having ordered that judgment be entered herein in favor of the defendants and against the above named plaintiffs in accordance therewith;

Wherefore, by reason of the law and the Findings of Fact and the Conclusions of Law of the Court, as aforesaid:

It Is Hereby Ordered, Adjudged and Decreed that plaintiffs take nothing by this action and that said defendant John D. Gregg, sued herein as J. D. Gregg, have and recover his costs herein taxed at \$553.80;

It Is Further Ordered, Adjudged and Decreed that said defendant City of Los Angeles, a municipal corporation, have and recover its costs herein taxed at \$.....;

It Is Further Ordered, Adjudged and Decreed as follows:

1. That defendant John D. Gregg shall not conduct any operation for the excavation of rock, sand or gravel from the so-called "Critical" area, as described in the complaint herein, lying northeasterly of Glenoaks Boulevard, at any time before 6:00 o'clock a.m. of any day or after 8:00 o'clock p.m. of any day, excepting that the said defendant John D. Gregg shall not be prohibited from making any reasonable or necessary repairs to equipment in said area during other hours.
2. That said defendant John D. Gregg house in any primary crusher which is operated in that portion of the so-called "Critical" area lying northeasterly of Glenoaks Boulevard so as to minimize any noise emanating therefrom.
3. That in connection with any and all drag-line operations on the banks or slopes of any pit excavated by defendant John D. Gregg in that part of the so-called "Critical" area lying northeasterly of Glenoaks Boulevard, that the said defendant John D. Gregg shall cause the banks or slopes of said excavation to be sprinkled with water prior to any such

drag-line operations so as to minimize the possibility of dust from any such operation being carried by the winds beyond the outer boundaries of said so-called "Critical" area.

4. That said defendant John D. Gregg, as soon as is reasonably practicable and as soon as material and equipment is available, shall complete the construction of the dust collection system in his rock crusher plant located southwesterly of Glenoaks Boulevard, the construction of which system was commenced prior to the commencement of this action.

The Clerk of the above entitled Court is hereby ordered to enter this judgment.

Dated September 10, 1947.

/s/ ALFRED L. BARTLETT,
Judge of the Superior Court.

[Endorsed]: Filed and entered Sept. 10, 1947.

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 522,031

JACKSON EARL WHEELER, et al.,
Plaintiffs,

vs.

J. D. GREGG, et al.,
Defendants.

Oliver O. Clark and Robert A. Smith, 643 South
Olive Street, Los Angeles, California, TRinity
9457, Attorneys for Plaintiffs.

NOTICE OF APPEAL

To the Defendants Herein and to Their Attorneys
of Record Herein, and to All Other Persons
Interested:

Notice is hereby given that the plaintiffs herein
hereby appeal to the Supreme Court of the State
of California from the judgment heretofore made
and entered herein, and from the whole thereof,
and from the order of the court heretofore made
and entered herein which denied the motion of these
plaintiffs that the judgment herein be set aside
and vacated by the above entitled court and another
and different judgment entered herein in favor of
the plaintiffs and against the defendants, as pro-

vided in Section 663 of the Code of Civil Procedure of the State of California.

Dated October 2, 1947.

/s/ OLIVER O. CLARK,

/s/ ROBERT A. SMITH,

Attorneys for Plaintiffs.

[Endorsed]: Filed Oct. 2, 1947. [218]

Received copy of the within affidavit of John D. Gregg this 1st day of December, 1947.

OLIVER O. CLARK,

By /s/ M. BAILUS,

Attorney for Plaintiffs.

[Endorsed]: Filed Dec. 1, 1947. [219]

In the United States District Court, Southern
District of California, Central Division

No. 7765—P. H.

HENRY WALLACE WINCHESTER, et al.,
Plaintiffs,

vs.

J. D. GREGG and the CITY OF LOS ANGELES,
a municipal corporation,

Defendants.

AFFIDAVIT OF DONALD J. DUNNE IN
OPPOSITION TO APPLICATION FOR
PRELIMINARY INJUNCTION

State of California,

County of Los Angeles—ss.

Donald J. Dunne, being first duly sworn on oath,
deposes and says:

That he is one of the attorneys of record for defendant John D. Gregg in the within action; that the land described in plaintiffs' Complaint in Equity herein as the "critical area" is the land in connection with which defendant has been granted by the City Council of the City of Los Angeles a Conditional Use Permit for the excavation of rock, sand and gravel and is the land which was involved in that certain action in the Superior Court of the State of California in and for the County of Los Angeles entitled "Jackson Earl Wheeler, et al., Plaintiffs, vs. J. D. Gregg, et al., Defendants," and numbered 522031; that in said Superior Court action Honorable Alfred L. Bartlett found that said Conditional Use Permit is valid, that the City Council of the City of Los Angeles in granting said Conditional Use Permit had not acted unfairly, arbitrarily or capriciously and judgment was entered against the plaintiffs and in favor of John D. Gregg denying an injunction prohibiting the excavation of rock, sand and [220] gravel from said land but setting forth four conditions which must be observed by defendant John D. Gregg in his operations, which conditions are in addition to the conditions set forth in the Conditional Use Permit; that a photostatic copy of the Complaint, the Answer of John D. Gregg, the Findings of Fact and Conclusions of Law, the Judgment and Notice of Appeal are attached to the affidavit of John D. Gregg filed concurrently herewith; that subsequent to the entry of judgment in said action the plaintiffs gave notice of appeal therefrom and are now actively prosecuting an appeal from said

judgment in the Supreme Court of the State of California and that the said appeal is still pending and has not been determined.

That as will appear from the affidavit of John D. Gregg filed concurrently herewith the land in the so-called "critical area" has no substantial value to defendant Gregg except for the production of rock, sand and gravel.

That it has long been established as the law of the State of California and by the decisions of the Supreme Court of the State of California and of other courts that the business of excavating rock and gravel by the owner from lands belonging to him is a lawful and useful occupation and cannot be prohibited by legislation; that in every reported case in California where governmental authority by legislation or ordinance has attempted to prohibit the excavation of rock, sand and gravel from land, the character of which made it useful for such purpose, such legislation or ordinances have been declared to be unconstitutional and invalid as the same applied to such lands; that such decision was made by the Supreme Court of the State of California in the cases of *People vs. Hawley*, 207 Cal. 395; *In Re: Throop*, 169 Cal. 93; *In Re: Kelso*, 147 Cal. 609;

That in two cases involving property in the vicinity of defendant's property the said rule of law has also been applied by the Superior Court of the State of California in and for the County of Los Angeles;

That the property of the Granite Materials Company lying a relatively short distance southerly of

defendant's and immediately adjacent to a new and growing residential district was some years ago zoned by the City of Los Angeles against the production of rock, sand and gravel, and an action was commenced in the Superior Court of the State of California in and for the County of [221] Los Angeles to enjoin the enforcement of said zoning in the case of DeHarpporte et al. vs. City of Los Angeles, No. 476337; that attached hereto marked Exhibit "A" and made a part hereof is a copy of the Judgment Roll in said case, wherein it was held that said ordinance was illegal and void as applied to said property;

That City Rock Company is the owner of rock land lying a relatively short distance northerly of defendant's property and that several years ago the City of Los Angeles zoned said property against the production of rock, sand and gravel and an action was commenced in the Superior Court of the State of California in and for the County of Los Angeles to enjoin the enforcement of said zoning in the case of Akmadzick vs. City of Los Angeles, No. 448415; that attached hereto marked Exhibit "B" and made a part hereof is a copy of the Judgment Roll in said case, wherein it was held that said ordinance was illegal and void as applied to said property;

That affiant alleges the foregoing for the purpose of demonstrating that defendant's right to excavate rock, sand and gravel from his said lands arises by virtue of defendant's ownership of said lands and the fact that said lands are adaptable only for the production of rock, sand and gravel

and said right does not primarily arise by virtue of any legislative action and that if legislative action should be such as to prohibit defendant from such operations that under the laws of the State of California defendant would be entitled to an injunction permanently prohibiting the interference by governmental authority in his operations for the production of rock, sand and gravel upon said lands; that affiant is informed and believes and therefore avers that had the City Council of the City of Los Angeles refused to grant defendant his Conditional Use Permit for the excavation of rock, sand and gravel upon said lands, that defendant under the facts of the instant case would have been entitled by reason of the foregoing to an injunction against the City of Los Angeles enjoining said City from interfering with his operations.

Affiant respectfully urges that based upon the facts alleged in the affidavit of John D. Gregg filed herein and by reason of the foregoing that the showing on the application for Preliminary Injunction is not sufficient to warrant the restraint sought and indicates that no material harm or loss will [222] be occasioned or suffered by plaintiffs during the interval before a decision can be had after trial and that no Preliminary Injunction should issue in the within action.

/s/ DONALD J. DUNNE.

Subscribed and sworn to before me this 28th day of November, 1947.

/s/ [Illegible]

Notary Public in and for said County and State.

EXHIBIT A

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 476337

L. F. DeHARPPORTE and CATHERINE E.
DeHARPPORTE, Husband and Wife, and
GRANITE MATERIALS COMPANY, a
corporation,

Plaintiffs,

vs.

THE CITY OF LOS ANGELES,

Defendant.

Anderson & Anderson, 1112 Black Building, Los Angeles, California, Phone MUTual 1241, Attorneys for Plaintiffs.

COMPLAINT

DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs complain and allege:

I.

That the plaintiff, Granite Materials Company, is now, and at all of the times herein mentioned has been, a corporation, organized and existing under and by virtue of the laws of the State of California, and having its office and principal place of business in the County of Los Angeles, State of California, and organized and empowered to acquire, own and operate real property for any and all legitimate and legal purposes, and particu-

larly for the development of rock crushing purposes, and for the handling, crushing and processing of such rock, and all business activities incident to, or connected therewith; and that the defendant, The City of Los Angeles, is, and at all of the times mentioned herein [224] has been, a duly and legally chartered city of the State of California, located in the County of Los Angeles, State of California.

II.

That the plaintiffs, L. F. DeHarpporte and Catharine E. DeHarpporte, are, and at all of the times herein mentioned have been, the owners, as joint tenants, in fee simple absolute, of that certain real property in the City of Los Angeles, County of Los Angeles, State of California, and in that portion of the said City of Los Angeles included in what is known as the San Fernando Valley, which said real property is more particularly described as follows, to-wit:

Block 325, as per Miscellaneous Records Book 37, pages 5 to 16, of the Records of Los Angeles County, California;

That said Block 325 contains approximately 40 acres.

III.

That the plaintiffs, L. F. DeHarpporte and Catharine E. DeHarpporte, hereinafter referred to as the "individual plaintiffs," have heretofore, for a valuable consideration, given to the plaintiff, Granite Materials Company, an option in writing, which

is still in full force and effect, to purchase said Block 325 above referred to, save and except that portion of said property fronting on Wicks Avenue, starting at Sharp Street and extending Southwesterly along Wicks Avenue to within 100 feet of Arleta Street, with a uniform depth of 150 feet, it being the purpose and intent of the plaintiff, Granite Materials Company, to purchase and acquire said property wholly and solely because of, and by reason of its value for rock development and rock crushing purposes, including excavation for rock, sand and gravel, and business activities connected with and incident to such rock development and rock crushing purposes; and it is the purpose and intent of said Granite Materials Company to exercise said option to purchase [225] said property if, only, and when the same can legally be used for such rock development and rock crushing purposes and such business activities connected with and incident thereto, and the business of rock development and rock crushing and other such allied business activities can be legally conducted and carried on upon said property; and that by virtue of the foregoing facts, the plaintiff, Granite Materials Company, has an interest in said property and in the subject matter of this action.

IV.

That said property, and the whole thereof, is wholly unfitted for, and has no appreciable value for any purpose, or purposes, other than the use

thereof for the business of rock development and rock crushing purposes, including excavation for rock, sand and gravel, and other allied businesses to be carried on in connection therewith, but that said, and the whole of said property is particularly and especially fitted for, and has a reasonably large value for such rock development and rock crushing purposes, and such other allied business to be carried on in connection therewith, and has no appreciable value whatever for any other purpose, or purposes, and is particularly unfit for any other kind of business, and has little, if any, value whatever for residence purposes, and the far greater portion thereof is wholly unfit for any kind or character of residence purposes whatsoever.

V.

That on or about February 16, 1916, the defendant, by and through its lawfully empowered legislative body, adopted an ordinance which became effective on or about March 19, 1916, known as Ordinance No. 33761 (New Series) of said City, and which purported to establish the entire City of Los Angeles, with certain exceptions, which exceptions did not include or affect said real property hereinbefore described, as a residence district.

That in and by said last mentioned Ordinance, defendant [226] purported to prohibit the establishment or maintenance in the said residence district of any and all business, commercial and/or industrial activities not specifically permitted in the

said Ordinance. That because of the exceptions in said Ordinance contained, no part of the land aforesaid was included within said residence district until said Ordinance was amended, as hereinafter alleged.

VI.

That thereafter defendant adopted an Ordinance which became effective on or about August 29, 1925, as Ordinance No. 52421, which amended Ordinance No. 33761 (New Series) by including within the residence district established by said Ordinance and making subject to the prohibitions thereof a certain area known as the Hansen Heights Addition, which said area included the property of plaintiff Company hereinabove described.

VII.

That thereafter defendant adopted an Ordinance which became effective on or about September 26, 1934, as Ordinance No. 74140 (New Series) which said Ordinance superseded and took the place of Ordinance No. 33761 (New Series), hereinabove mentioned as amended, and said Ordinance No. 74140 is now, and at all times from and after September 26, 1934, has been, in full force and effect as the residence district ordinance of the defendant City, and that the prohibitions contained in the said Ordinance purport to prohibit the establishment or maintenance upon the real property of the individual plaintiffs hereinabove described of any business, commercial or industrial activity save and except as specifically permitted by said Ordinance No. 74140.

VIII.

That by virtue of the aforementioned facts and the terms and provisions of the ordinance herein mentioned, the use and occupation of the real property hereinbefore described for the [227] business of rock development and rock crushing, excavating sand and gravel, and any and all businesses and business activities incidental thereto and connected therewith, will constitute a nominal and seeming violation of the terms and conditions of said ordinance, and seemingly would subject the owners of said property to penalties for such apparent and seeming violation.

IX.

That it is the attitude and opinion of the City Attorney of the defendant, and of the defendant itself, that property of the kind, class and character of the property hereinbefore described, and located and situated as such property hereinbefore described is located and situated, may and can no longer be used for the purposes described in paragraph IV hereof as the purposes to which it is best suited and adapted, and the Planning Commission of the defendant, when requested so to do by the owners of said property hereinbefore described, refused to re-zone the same so that it could be used for any of such purposes, or for any purpose, or purposes, other than residence purposes, or other than as nominally permitted by such ordinances.

X.

That a dispute and controversy now exists by and between plaintiffs and defendant with respect to the interpretation of the ordinances above mentioned, and the application of said ordinances to the property hereinbefore described, as follows, to-wit:

(a) That defendant contends that the said property may not legally be used, nor any part of the same may legally be used, for those purposes, activities and uses designated in paragraph IV hereof, and the uses and purposes to which it is best adapted;

(b) That plaintiff company contends that the said properties, and the whole thereof, may be used for said purposes.

XI.

That it is material and essential to the preservation of [228] the individual plaintiffs' property rights in and to said property, and to its full free enjoyment of its proper rights and privileges as the owner thereof, that a declaratory judgment be entered herein settling and determining the said controversy between plaintiffs and defendant hereinabove described, and that by reason of the foregoing facts plaintiff company has neither a plain, speedy and adequate remedy at law, nor any remedy at law whatsoever.

And for Another, and Further, and Separate Cause of Action, and as a Second, Separate and Distinct Cause of Action, plaintiffs allege as follows:

I.

Plaintiffs incorporate herein, and adopt and make a part hereof, the same as if herein set forth at length, Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and XI of their foregoing first cause of action.

II.

That a dispute and controversy now exists by and between plaintiffs and defendant with respect to the interpretation of the ordinances above mentioned, and the application of said ordinances to the property herein described, and particularly with reference to subdivision (h) of Section 16.04 of the Los Angeles Municipal Code Ordinance 77000, being a codification of Ordinance 74140 hereinabove mentioned, which said controversy and dispute is as follows:

(a) That defendant contends that by reason of the terms and conditions of said subdivision (h) of said Section 16.04, the plaintiffs' rights to conduct on the hereinabove described property those activities and uses hereinabove mentioned in paragraph IV of the first cause of action hereof have been lost.

(b) Plaintiffs contend that the said property may be used for the purposes, activities and uses

described in paragraph IV [229] of the first cause of action hereof, and that the rights so to do have not been lost, by reason and because of the fact that the aforementioned subdivision (h) of said Section 16.04 was, and is, unconstitutional and void insofar as the same is applicable to the property herein described, in that the said ordinance as applied to the said property is unjust, unreasonable, arbitrary and confiscatory, and, if enforced, would deprive the plaintiffs of their property and property rights without due process of law.

And for Another, and Further, and Separate Cause of Action, and as a Third, Separate and Distinct Cause of Action, plaintiffs allege as follows:

I.

Plaintiffs incorporate herein, and adopt and make a part hereof, the same as if herein set forth at length, Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and XI of their foregoing first cause of action.

II.

That the property hereinabove described was, and is, of a type peculiarly suited for the purposes of excavating for rock, sand and gravel, and for carrying on the rock, sand and gravel business as described in paragraph IV of the first cause of action hereof, and that the said property is not suitable or valuable for any other use or purpose whatsoever. Plaintiffs further allege that unless the said property is used and employed for the purposes

above mentioned, the same is, and will be, of no value whatsoever to plaintiffs, or to either or any of them, and that if the said property is, and may be, used for the purposes hereinabove mentioned, the same will be of great value to plaintiffs, and to each and all of them.

III.

That a dispute and controversy now exists by and between [230] plaintiffs and defendant with respect to the interpretation of the Ordinances above mentioned, and the application of said Ordinances to the property hereinabove described, which said controversy and dispute is as follows:

(a) That defendant contends that the above mentioned Ordinances can, and do, prohibit plaintiffs, and each and all of them, from carrying out on the above described premises those activities and uses hereinabove mentioned in paragraph IV of the first cause of action hereof.

(b) Plaintiffs contend that the said Ordinances do not, and cannot, prohibit the use and employment of the said property for the purposes, uses and activities described in paragraph IV of the first cause of action hereof, by reason of the fact that the said Ordinances, if so applied and interpreted, were, and are, unjust, unreasonable, arbitrary and confiscatory, and would thereby render the said property described herein, and the whole thereof, of no value whatsoever, and deprive the individual plaintiffs of the said property without due process of law.

And for Another, and Further, and Separate Cause of Action, and as a Fourth, Separate and Distinct Cause of Action, plaintiffs allege as follows:

I.

Plaintiffs incorporate herein, and adopt and make a part hereof, the same as if herein set forth at length, Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and XI of their foregoing first cause of action.

II.

That a dispute and controversy now exists by and between plaintiffs and defendant with respect to the interpretation of the Ordinances above mentioned, and the application of said Ordinances to the property hereinabove described, and particularly with [231] reference to subdivision (g) of Section 16.04 of the Los Angeles Municipal Code Ordinance 77000, being a codification of Ordinance 74140 hereinabove mentioned, which said controversy and dispute is as follows:

- (a) Defendant contends that notwithstanding the terms and conditions of said subdivision (g) of said Section 16.04, the plaintiffs may not use any of the property hereinabove mentioned for the uses, purposes and activities mentioned in paragraph IV of the first cause of action herein.
- (b) Plaintiffs contend that under and by virtue of the terms and provisions of said subdivision (g) of said Section 16.04, the property,

and the whole thereof, herein described may be used for the uses, purposes and activities described in paragraph IV of the first cause of action herein.

Wherefore, plaintiffs pray judgment as follows:

First: That a declaratory judgment be made and entered that plaintiffs are lawfully entitled to occupy and use the property described in Paragraph II of the first cause of action of the within complaint for those objects, uses, purposes and activities described in Paragraph IV of the within complaint.

Second: That a declaratory judgment be made and entered that subdivision (h) of Section 16.04 of the Los Angeles Municipal Code Ordinance No. 77000 was, and is, unconstitutional and void as applied to the property of the plaintiffs hereinabove mentioned.

Third: That a declaratory judgment be made and entered that each and every subdivision of Chapter I, Article 6, of Ordinance No. 77000 of the City of Los Angeles, being otherwise known as the Residence District Ordinance and as a codification of Ordinance No. 74140 of the said City, be, and the same is, unconstitutional and void as applied to the property of the plaintiffs hereinabove mentioned.

Fourth: That the defendant be permanently enjoined and [232] restrained from interfering with

plaintiffs' proper use and enjoyment of the property of plaintiff company in the manner hereinabove described.

Fifth: For their costs of suit in this action incurred; and,

Sixth: For such other and further general relief as the court may deem to be just, right and equitable.

ANDERSON & ANDERSON,
By /s/ W. H. ANDERSON,
Attorneys for Plaintiff [233]

State of California,
County of Los Angeles—ss.

L. F. DeHarpporte, being by me first duly sworn, deposes and says that he is one of the plaintiffs in the above entitled action; that he has read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ L. F. DeHARPPORTE.

Subscribed and sworn to before me this 7th day of May, 1942.

[Seal] /s/ TRENT G. ANDERSON.
Notary Public in and for the County of Los Angeles,
State of California. [234]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 476,337

L. F. DeHARPPORTE and CATHERINE E.
DeHARPPORTE, Husband and Wife, and
GRANITE MATERIALS COMPANY, a
corporation,

Plaintiffs,

vs.

THE CITY OF LOS ANGELES, a municipal
corporation,

Defendant.

Anderson & Anderson, 1112 Black Building, Los
Angeles, California, Phone MUtual 1241, Attorneys
for Plaintiffs.

AMENDED AND SUPPLEMENTAL
COMPLAINT—INJUNCTIVE RELIEF

Now comes the plaintiffs, and amending and
supplementing their complaint heretofore filed
herein, complain and allege:

I.

That the plaintiff, Granite Materials Company,
is now, and for several years last past has been,
a corporation, organized and existing under and
by virtue of the laws of the State of California,
and having its office and principal place of business
in the County of Los Angeles, State of California,

and authorized and empowered to acquire, own and operate real property for any and all legitimate and legal purposes, and particularly for the development of rock crushing purposes, and for the handling, crushing and processing of such rock, and all business activities incident to, or connected [235] therewith; and that the defendant, The City of Los Angeles, is, and at all of the times mentioned herein has been, a duly and legally chartered municipal corporation, to-wit, a city of the State of California, located in the County of Los Angeles, State of California.

II.

That the plaintiffs, L. F. DeHarpporte and Catherine E. DeHarpporte, are the owners, as joint tenants in fee simple absolute, of that certain real property in the City of Los Angeles, County of Los Angeles, State of California, and in that portion of the said City of Los Angeles included in what is known as the San Fernando Valley, which said real property is more particularly described as follows, to-wit:

Block 325 of the Maclay Rancho Ex Mission San Fernando, as per map recorded in Book 37, pages 5 to 16, Miscellaneous Records of Los Angeles County, California;
that said Block 325 is hereinafter referred to as Parcel One.

That the plaintiffs, L. F. DeHarpporte and Catherine E. DeHarpporte have, since the filing of the complaint herein, become the owners, as

joint tenants, in fee simple absolute, of that certain real property in the City of Los Angeles, County of Los Angeles, State of California, and in that portion of the said City of Los Angeles included in what is known as the San Fernando Valley, which said real property is more particularly described as follows, to-wit:

Block 340 of the said Maclay Rancho Ex Mission San Fernando, as per map recorded in Book 37, pages 5 to 16, Miscellaneous Records of Los Angeles County, California;

that said Block 340 is hereinafter referred to as Parcel Two.

That said Parcels One and Two are contiguous.

III.

That the plaintiffs, L. F. DeHarpporte and Catherine E. DeHarpporte, [236] hereinafter referred to as the "individual plaintiffs," have heretofore, for a valuable consideration, given to the plaintiff, Granite Materials Company, an option in writing, which is still in full force and effect, to purchase said Block 325 above referred to, Parcel One herein, save and except that portion of said block fronting on Wicks Avenue, starting at Sharp Street and extending Southwesterly along Wicks Avenue to within 100 feet of Arleta Street, with a uniform depth of 150 feet; and said plaintiffs have, since the filing of the complaint herein, for a valuable consideration, given to the plaintiff, Granite Materials Company, an option in writing.

which is still in full force and effect, to purchase said Block 340, Parcel Two herein, it being the purpose and intent of the plaintiff, Granite Materials Company, to purchase and acquire said Parcels One and Two wholly and solely because of, and by reason of their value for rock development and rock crushing purposes, including excavation for rock, sand and gravel, and business activities connected with and incident to such rock development and rock crushing purposes; and it is the purpose and intent of said Granite Materials Company to exercise said options to purchase said property if, only, and when the same can legally be used for such rock development and rock crushing purposes and such business activities connected with and incident thereto, and the business of rock development and rock crushing and other such allied business activities can be legally conducted and carried on upon said property without interference, let or hindrance by defendant as hereinafter alleged to be threatened by defendant; and that by virtue of the foregoing facts, the plaintiff, Granite Materials Company, has an interest in said property and in the subject matter of this action.

IV.

That said property, and the whole thereof, is practically unfitted for, and has no appreciable value for any purpose, or [237] purposes, other than the use thereof for the business of rock development and rock crushing purposes, including excavation for rock, sand and gravel, and other allied businesses to be carried on in connection

therewith, but that said, and the whole of said property is particularly and especially fitted for, and has a reasonably large value for such rock development and rock crushing purposes, and such other allied business to be carried on in connection therewith, and has no appreciable value whatever for any other purpose, or purposes, and is particularly unfit for any other kind of business, and has little, if any, value whatever for residence purposes, and the far greater portion thereof is wholly unfit for any kind or character of residence purposes whatsoever.

V.

That by the provisions of Ordinance No. 33,761 (New Series), adopted March 19, 1916, the real property described in Paragraph II hereof was zoned for residential purposes, and the use of said property for the purpose of constructing, operating, or maintaining a rock crushing plant thereon was prohibited; that by the provisions of Ordinance No. 74,140, adopted September 26, 1934, said Ordinance No. 33,761 was re-published and re-enacted, and the real property, described in Paragraph II hereof, was again classified as residential property in the same manner after the same had been classified as residential property under Ordinance No. 33,761; that on or about the 28th day of September, 1936, the City of Los Angeles adopted Los Angeles Municipal Code, which is numbered No. 77,000. By the terms of said ordinance, Ordinance No. 74,140 was incorporated into the provisions of the Los Angeles Municipal Code in Article 6 of Chapter 1 thereof;

That by reason thereof the defendant threatens and intends to and will, unless restrained and enjoined by this Court, compel the owner or owners thereof to restrict its use wholly and solely to residential purposes and uses only, and threatens and intends [238] to and will, unless so restrained and enjoined, interfere with and prevent its use for any other purpose or purposes, and particularly to prevent its use for the said only uses and purposes for which, as above alleged, it is particularly and practically fitted, and for which alone it has any particular or appreciable value whatever, to-wit, the uses and purposes alleged and described in Paragraph IV hereof.

That said claim of defendant is wholly without any legal right whatsoever, and if said claim is enforced as so threatened by said defendant, it will deprive said property of all reasonable value, and will deprive the plaintiffs of all appreciable value of said property and the whole thereof, and will deprive them of its said proper and valuable use without due process of law in violation of the provisions of the Constitution of the United States, and particularly of Section 1, of Article XIV of said Constitution, and in violation of the provisions of the Constitution of the State of California.

VI.

That it is the attitude and opinion of the City Attorney of the defendant, and of the defendant itself, that property of the kind, class and character of the property hereinbefore described, and located and situated as such property hereinbefore

described is located and situated, may and can no longer be used for the purposes described in paragraph IV hereof as the purposes to which it is best suited and adapted, and the Planning Commission of the defendant, when requested so to do by the owners of said Parcel One hereinbefore described, refused to re-zone the same so that it could be used for any of such purposes, or for any purpose, or purposes, other than residence purposes.

VII.

That plaintiffs have no plain, speedy or adequate remedy at law. [239]

Wherefore, plaintiffs pray judgment as follows:

First: That the defendant, The City of Los Angeles, be permanently enjoined and restrained from enforcing the provisions of said Article 6, Chapter 1, of the Los Angeles Municipal Code against the real property hereinabove described as Parcels 1 and 2, insofar as said Article 6, Chapter 1, of the Los Angeles Municipal Code prohibits the use of said real property for the purposes of constructing, operating or maintaining a rock crushing or sand and gravel plant on said property, or any part thereof, or prohibits the use of said real property for excavating rock, sand or gravel from said real property, or any part thereof, including other incidental businesses to be carried on in connection therewith;

Second: For their costs of suit in this action incurred; and,

Third: For such other and further general relief as the Court may deem to be just, right and equitable.

ANDERSON & ANDERSON,
By /s/ TRENT G. ANDERSON,
Attorneys for Plaintiffs.

[Endorsed]: Filed July 3, 1942. [240]

In the Superior Court of the State of California,
in and for the County of Los Angeles.

No. 476-337. Dept. 20.

L. F. DeHARPPORTE and CATHERINE E. De-
HARPPORTE, Husband and Wife, and
GRANITE MATERIALS COMPANY, a Cor-
poration,

Plaintiffs,

vs.

THE CITY OF LOS ANGELES, a municipal cor-
poration,

Defendant.

Anderson & Anderson, 1112 Black Building, Los Angeles, California, Mutual 1241, Attorneys for Plaintiffs.

Hon. Thomas C. Gould, Presiding.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled cause came on regularly for trial on the 8th day of October, 1942, before the Court sitting without a jury, Messrs. Anderson &

Anderson appearing as attorneys on behalf of plaintiffs, and Ray L. Chesebro, City Attorney, and Clyde F. Harrell, Jr., Deputy City Attorney, appearing for and on behalf of the defendant, and evidence, both oral and documentary, having been introduced and the cause submitted for decision, the Court now makes its Findings of Fact as follows:

Findings of Fact

First: That all the allegations of plaintiffs' amended and supplemental complaint are true.

Second: That none of the allegations of defendant's answer to said amended and supplemental complaint, except insofar as such [241] allegations constitute and are admissions of the allegations of the plaintiffs' amended and supplemental complaint, is true.

Conclusions of Law

And as Conclusions of Law from the foregoing facts the Court finds that the plaintiffs are entitled to judgment as follows, to-wit:

First: That the defendant, The City of Los Angeles, be permanently enjoined and restrained from enforcing the provisions of Article 6, Chapter 1, of the Los Angeles Municipal Code, referred to in said amended and supplemental complaint, against the real property described in said amended and supplemental complaint as Parcels One and Two, insofar as said Article 6, Chapter 1, of the Los Angeles Municipal Code prohibits the use of said real property for the purposes of constructing, operating or maintaining a rock crushing plant, or sand

and gravel plant on said property, or any part thereof, or prohibits the use of said real property for excavating rock, sand or gravel from said real property, or any part thereof, including other incidental businesses to be carried on in connection therewith.

Second: That the plaintiffs recover their costs of suit in this action incurred.

Let judgment be entered accordingly.

Dated: Octobed 16th, 1947.

/s/ THOMAS C. GOULD,
Judge.

State of California,
County of Los Angeles—ss.

L. F. DeHarpporte, being by me first duly sworn, deposes and says: that he is one of the plaintiffs in the above entitled action; that he has read the foregoing Amended and Supplemental Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ L. F. DeHARPPORTE.

Subscribed and sworn to before me this 25th day of June, 1942.

[Seal] /s/ TRENT G. ANDERSON,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Oct. 16, 1942. [243]

In the Superior Court of the State of California,
in and for the County of Los Angeles.

No. 476-337. Dept. 20.

L. F. DeHARPPORTE and CATHERINE E. De-
HARPPORTE, Husband and Wife, and
GRANITE MATERIALS COMPANY, a Cor-
poration,

Plaintiffs,

vs.

THE CITY OF LOS ANGELES, a municipal cor-
poration,

Defendant.

Anderson & Anderson, 1112 Black Building, Los
Angeles, California, Mutual 1241, Attorneys for
Plaintiffs.

Hon. Thomas C. Gould, Presiding.

JUDGMENT

The above entitled cause came on regularly for
trial on the 8th day of October, 1942, before the
Court sitting without a jury, Messrs. Anderson &
Anderson appearing as attorneys for plaintiffs, and
Hon. Ray L. Chesebro, City Attorney, and Clyde
F. Harrell, Jr., Deputy City Attorney, appearing
for the defendant, and evidence, both oral and docu-
mentary, having been introduced and the cause sub-
mitted for decision, and the Court having made its
Findings of Fact and Conclusions of Law, and or-
dered judgment accordingly;

Now, Therefore, in conformity with said Find-
ings of Fact and said Conclusions of Law consti-

tuting the decision of the Court in said action, It Is Hereby Ordered, Adjudged and Decreed as [214] follows, to-wit:

First: That the defendant, The City of Los Angeles, be, and it is hereby, permanently enjoined and restrained from enforcing the provisions of Article 6, Chapter 1, of the Los Angeles Municipal Code, referred to in the amended and supplemental complaint in this action, against the real property described as Parcels One and Two in said amended and supplemental complaint of plaintiffs, insofar as said Article 6, Chapter 1, of the Los Angeles Municipal Code prohibits the use of said real property for the purposes of constructing, operating or maintaining a rock crushing plant, or sand and gravel plant on said property, or any part thereof, or prohibits the use of said real property for excavating rock, sand or gravel from said real property, or any part thereof, including other incidental businesses to be carried on in connection therewith, all of said real property being located in that portion of the said City of Los Angeles included in what is known as the San Fernando Valley, which said real property is more particularly described as follows, to-wit:

Parcel One: Block 325 of the Maclay Rancho Ex Mission San Fernando, as per map recorded in Book 37, pages 5 to 16. Miscellaneous Records of Los Angeles County, California;

Parcel Two: Block 340 of the said Maclay Rancho Ex Mission San Fernando, as per map

recorded in Book 37, pages 5 to 16, Miscellaneous Records of Los Angeles County, California.

Second: That the plaintiffs have and recover of the defendant their costs of suit in this action incurred, taxed at \$.....

Dated: October 16th, 1942.

/s/ THOMAS C. GOULD,
Judge.

[Endorsed]: Filed Oct. 16, 1942. [245]

EXHIBIT B

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 448415

PETER J. AKMADZICH and MARY LOUISE
AKMADZICH,

Plaintiffs,

vs.

CITY OF LOS ANGELES, a municipal corporation,
ARTHUR C. HOHMAN, as Chief of Police of the City of Los Angeles,
RAY L. CHESEBRO, as City Attorney of the City of Los Angeles,
ONE DOE, TWO DOE, THREE DOE, FOUR DOE, FIVE DOE,
SIX DOE, SEVEN DOE, EIGHT DOE, NINE DOE and TEN DOE,

Defendants.

COMPLAINT FOR INJUNCTIVE RELIEF

Now comes the plaintiffs and for cause of action allege:

I.

Plaintiffs are now and were at all times herein mentioned, husband and wife.

Defendant City of Los Angeles is now and was at all times herein mentioned, a municipal corporation and political subdivision of the State of California.

Defendant Arthur C. Hohmann is the duly appointed, qualified and acting Chief of Police of the City of Los Angeles.

Defendant Ray L. Chesebro is the duly elected, qualified and acting City Attorney of the City of Los Angeles.

Defendants One Doe to Ten Doe, inclusive, are agents, [246] servants, employees and officers of the City of Los Angeles. The true names of said defendants are unknown to plaintiffs, but plaintiffs, upon ascertaining the true names of such defendants, will amend their complaint by inserting the true names of defendants aforesaid, herein.

II.

That defendant Arthur C. Hohmann, as Chief of Police of the City of Los Angeles, is the law enforcement and principal peace officer of said City.

Defendant Ray L. Chesebro, as the City Attorney of the City of Los Angeles, is charged with the duty and responsibility under the charter of the City of Los Angeles, of prosecuting violations of ordinances and purported ordinances of said City.

III.

Plaintiffs are the owners of certain real property situated in the City of Los Angeles, County of Los Angeles, State of California, described as follows, to wit:

Lots 1, 2, 21 and 22, Tract No. 999, as per Map recorded in Book 16, Pages 166 and 167 of Maps, Records of Los Angeles County, State of California;

Also, Lots 1 and 2, Tract No. 10958, as per Maps recorded in Book 198, Pages 8, 9 and 10 of Maps, records of said County, excepting therefrom any portion of the above lots lying within the boundary of any public street.

Said property embraces an area of approximately fifty-four acres.

Plaintiffs acquired the portion of said property formerly described as Lots 19 and 20, Tract 999 in the County of Los Angeles, State of California, hereinafter more particular referred to, on or about the 15th day of August, 1934, and acquired the remainder of said property from time to time subsequent thereto, and prior to February 27, 1936.

IV.

That at the time plaintiffs acquired former Lots 19 and 20, of Tract 999, there was situated thereon machinery and equipment for excavating and crushing rock, commonly known as a rock crushing plant; that thereafter plaintiff Peter J. Akmadzich operated said property as a rock crushing plant,

and from time to time constructed additional machinery and equipment for such purpose, and improved the existing machinery and equipment; that on or about the month of March, 1937, the said Peter J. Akmadzich found that he could not operate the said rock crushing plant at a profit, without also operating in conjunction therewith a hot mix asphalt plant for the production of asphalt for street paving purposes; that by reason thereof, on or about the 22nd day of March, 1937, the said Peter J. Akmadzich constructed on the area which constituted former Lots 19 and 20 of Tract 999, a hot mix asphalt plant, and thereafter and until the present time, has operated the said rock crushing plant and hot mix asphalt plant conjunctively as a single business enterprise; that the said Peter J. Akmadzich has invested in the improvement and development of said property for the purposes of operating said rock crushing plant and said hot mix asphalt plant, between the dates of August 15, 1934, and the present time, the sum of approximately \$175,000, and that the said real property, consisting of approximately fifty-four acres, hereinbefore described, together with the improvements thereon, has a market value of \$250,000 if the said property be operated as a rock crushing and hot mix asphalt plant.

V.

That all of the machinery and equipment on said property for crushing rock and for mixing hot asphalt, commonly referred to as the rock crushing machinery, and the hot mix asphalt machinery, is

located within the area of approximately ten acres formerly described as Lots 19 and 20 of Tract 999, hereinbefore referred to, [248] and that the remainder of said property is being used for the purposes only of excavating rock therefrom.

VI.

That the said property is located in the bed of the Tujunga Wash and immediately adjacent to the channel through which the water of the Tujunga Wash flow, and that said property is subject to flooding and overflow, at periods of heavy rainfall; that the said rock crushing and hot mix asphalt plant is located approximately 1500 feet distance from the nearest dwelling or place of human habitation; that the rock and gravel underlying all of the plaintiffs' property, and which is being excavated, mined and distributed by the plaintiff Peter J. Akmadzich from said property is extraordinary in desirable quality, character and texture, and that said rock and gravel is the only rock and gravel found or produced in the City of Los Angeles or immediately adjacent thereto, that complies with the standard specifications for road building materials adopted and maintained by the State Highway Department of the State of California.

That the property of the plaintiffs is so located that a rock crushing and hot mix asphalt plant can be operated on said premises with less inconvenience or annoyance to residents of the City of Los Angeles or to the general public than at any other place within the City of Los Angeles where rock deposits are to be found.

VII.

That the said property of the plaintiffs is of no value whatever for residence purposes, and in fact is positively unfit for residence purposes by reason of the liability and menace of flooding and overflow as hereinbefore alleged, and that for such reason it would be unsafe to construct a residence or dwelling house upon such property; that the said property is valueless for agricultural purposes or for any other purpose except for the [249] purposes for which said property is being utilized as hereinbefore alleged.

That the plaintiff Peter J. Akmadzich has developed a large and profitable business upon said property through the efficient, skillful and scientific operation and maintenance of said rock crushing plant and said hot mix asphalt plant, and that it would be impossible to operate the said property at a profit, if the operation were confined to the rock crushing plant and the area of excavation were confined to the area of former Lots 19 and 20 of Tract 999 hereinbefore referred to.

VIII.

That on or about the 16th day of February, 1916, the City of Los Angeles adopted an Ordinance commonly known and designated as Ordinance No. 33761 (N.S.) under and by virtue of the terms of which the entire area of the City of Los Angeles with the exception of certain districts designated therein, was restricted to use for residential purposes; that at the time of the adoption of the said

Ordinance, the property now owned by the plaintiffs as hereinbefore alleged, was not included within the limits of the City of Los Angeles, but that thereafter, on or about the 11th day of of April, 1918, an area was annexed to the City of Los Angeles, including the said property of plaintiffs; that on or about the 29th day of August, 1925, Ordinance 52421 was adopted by the City of Los Angeles amending said Ordinance No. 33761 (N.S.) under and by virtue of the terms of which the provisions of said Ordinance No. 33761 (N.S.) were extended to the property so annexed to the City of Los Angeles, and the area occupied by the property of the plaintiffs was included within the district in said City of Los Angeles restricted to residential use; that thereafter, to wit, on or about August 28, 1931, the City of Los Angeles adopted an Ordinance commonly known as Ordinance No. 70210 under and by virtue of the terms of which it was provided that Lots 19 and 20 of Tract No. [250] 999, as per Map recorded in Book 16, Pages 166 and 167 of Maps, Records of Los Angeles County, should be excepted from the residence district of the City of Los Angeles; that said Lots 19 and 20 referred to, described an area of approximately ten acres, which was subsequently included in and constitutes the Westerly portion of Lot 1 of Tract No. 10958 hereinbefore described.

That thereafter, to wit, on or about September 21, 1934, the City of Los Angeles adopted an Ordinance commonly known as Ordinance No. 74140, which Ordinance contained various provisions re-

stricting the use of property in various localities in the City of Los Angeles, and among other things, contained the following provision:

“(d) For the purpose of this Article, each of those separate portions of the City which prior to the effective date of Ordinance 74140 had been excepted from the Residence District by ordinance adopted by the Council, shall be considered as having been granted a variance from the provisions of this Article but only so far as such variance is necessary to permit the use of the lot or premises involved for the particular purpose for which the original exception was granted as shown by the records of the case on file with the Board or with the City Clerk.”

That thereafter, to wit, on or about the 12th day of November, 1936, the City of Los Angeles adopted an ordinance commonly known as No. 77,000 and also commonly known and officially designated as the Los Angeles Municipal Code; that the said Ordinance constituted a re-enactment and codification of a large number of previously enacted ordinances in said City, and among other things, re-enacted the provisions of Ordinance No. 33761 (N.S.) as amended as hereinbefore alleged, and the provisions of Ordinance No. 70210 and the provisions of Ordinance No. 74140 as hereinbefore alleged.

That said Ordinance No. 77,000 contains provisions to the effect that all of the property of the

plaintiffs with the exception of the area embraced in former Lots 19 and 20 of Tract 999, shall be used for residential purposes only, and for no other purpose.

IX.

That the defendants claim, contend and assert in connection with Ordinance No. 70210 that the records relating thereto on file with the Department of City Planning and with the City Clerk of the City of Los Angeles, indicate and show that the exception granted by said Ordinance was granted to permit the use of the property therein described, to wit, former Lots 19 and 20 of Tract 999 for the purpose of operating a wet process rock crushing plant only, and for no other purpose, and the defendants further claim, contend and assert that under the provisions of said Ordinances hereinbefore referred to, the plaintiffs are prohibited from operating said hot mix asphalt plant and from excavating rock outside of the area of said former Lots 19 and 20 of Tract 999, and are prohibited from using their said property outside of said area for any purpose except for residential purposes.

That as hereinbefore alleged, the rock crushing plant hereinbefore referred to, cannot be operated at a profit except in conjunction with the hot mix asphalt plant, and then only if the excavation of rock from the property of the plaintiffs outside of the area of said former Lots 19 and 20, Tract 999 be permitted.

X.

That none of the property of the plaintiffs has any value whatever for any other use except for the purpose of excavating rock and operating said rock crushing plant and hot mix asphalt [252] plant in conjunction therewith, and that if such uses of the property be prohibited, it will completely destroy the value of plaintiff's property and result in the confiscation thereof.

XI.

That numerous other rock crushing plants and hot mix asphalt plants exist and are being operated within the city limits of the City of Los Angeles, and that as to each of said plants there is less reason or justification for permitting the operation of such plants than there is for permitting the operation of rock crushing plant and hot mix asphalt plant hereinbefore referred to, and that as to each of such plants, there is less reason and justification for permitting the excavation of rock than upon the property of the plaintiffs hereinbefore described; that none of said plants is so remotely situated from places of human habitation and residential districts as the property of the plaintiffs in this action; that with respect to many of said plants, there are numerous residences and places of habitation surrounding the said plants, and within a distance of from 500 to 1,000 feet thereof, and that some of said plants are entirely surrounded by a closely built residential district, and that the land upon which most of said plants

are situated could safely be used for and is adaptable to the construction and maintenance of residences for human habitation; that with reference to said plants, the City of Los Angeles in each instance has adopted an Ordinance or Ordinances permitting the operation of said plants.

XII.

Plaintiffs have endeavored to secure the adoption by the city authorities of the City of Los Angeles of an Ordinance permitting the operation of the said rock crushing plant and hot mix asphalt plant and the conduct of said excavation on the property of the plaintiffs, and the officials of the City of Los Angeles have refused to adopt such Ordinance, and have [253] refused to grant permission to the plaintiffs to continue the said operations hereinbefore alleged.

XIII.

That the Ordinances hereinbefore referred to, insofar as they purport to prohibit the operation of said rock crushing plant and of said hot mix asphalt plant and the conduct of said excavation on the property of the plaintiffs, are void and unenforceable for the following reasons:

1st: The said Ordinances, if enforced, will confiscate the property of the plaintiffs;

2nd: The Ordinances aforesaid are unreasonable, arbitrary and oppressive;

3rd: The said Ordinances are discriminatory in that other rock crushing plants and hot mix asphalt plants in the City of Los Angeles are permitted to be operated under more objectionable circumstances than the circumstances surrounding the property of the plaintiffs;

4th: The provisions of said Ordinances in their operation upon the property of the plaintiffs, violate the provisions of Section 13, Article I of the Constitution of the State of California;

5th: That the provisions of said Ordinances in their operation upon the property of the plaintiffs, violate the provisions of Section 14, Article I of the Constitution of the State of California;

6th: That the provisions of said Ordinances in their operation upon the property of the plaintiffs, violate the provisions of [254] Section 1 of the Fourteenth Amendment to the Constitution of the United States;

8th: That the provisions of said Ordinances and their operation upon the property of the plaintiffs, violate the provisions of the Fifth Amendment to the Constitution of the United States.

XIV.

That the present conduct and operation of plaintiffs' business or the future operation thereof in

the present location, will not tend to, and will not, endanger or impair either the health, safety, morals, convenience, comfort or welfare of the general public, and does not and will not interfere with the use and occupation of the dwellings situate and being adjacent to the premises owned by the plaintiffs.

XV.

That the said Ordinances provide that each and every violation thereof, and each and every day for which such violation shall continue, shall constitute a misdemeanor, and that upon conviction, the person offending against each ordinances, may be fined and imprisoned, or fined or imprisoned; that the defendants threaten to enforce said Ordinances against the plaintiffs, and to cause the plaintiffs to be prosecuted and arrested for violating the said Ordinances by reason of the operation of said rock crushing plant and said hot mix asphalt plant, and the conduct of said excavations, and unless the defendants be enjoined and restrained by this Court from so doing, plaintiffs are informed and believe, and upon such information and belief allege, that the defendants will cause the plaintiffs to be arrested and imprisoned for such violations of said Ordinances, and will cause prosecutions to be instituted against the plaintiffs for said alleged violations, and a multiplicity of proceedings will be instituted and prosecuted by the defendants against the plaintiffs.

XVI.

That the plaintiffs have no plain, speedy or adequate remedy at law, and that unless an injunction be granted by this Honorable Court, enjoining the defendants from enforcing said Ordinances against the plaintiffs, in the particulars hereinbefore alleged, the plaintiffs will suffer great and irreparable injury.

XVII.

That the defendants have already instituted one prosecution against the plaintiffs for an alleged violation of said Ordinances, and threaten to immediately institute other prosecutions against the plaintiffs of the same nature, and to immediately compel the plaintiffs to suspend the operations of said rock crushing plant and said hot mix asphalt plant and of said excavation, and plaintiffs are informed and believe and upon such information and belief allege, that the defendants will do all of these things unless restrained by this Court from so doing, and that the plaintiffs will immediately suffer great and irreparable injury as a result thereof.

Wherefore, plaintiffs pray:

1. That an order to show cause be issued herein, requiring the defendants to appear and show cause, at a place and time to be fixed therein, why the defendants and each of them, their agents, representatives, servants and employees, should not be enjoined, pending the

determination of this action, from enforcing said ordinances against the plaintiffs, or from interfering with the plaintiffs in the enjoyment of their said property and the operation of the said rock crushing plant, hot mix asphalt plant and excavation work above referred to; and that pending the hearing of such order to show cause, a temporary restraining [256] order be issued, restraining the defendants and each of them, their agents, representatives, servants and employees, from doing these things;

2. That upon the trial of this case, plaintiffs have judgment for a permanent injunction, enjoining the defendants and each of them, their agents, servants, representatives and employees from enforcing said ordinances against the plaintiffs, or interfering with the operation by the plaintiffs or either of them, of said rock crushing plant, hot mix asphalt plant, and with the excavation operations hereinbefore referred to;
3. That plaintiffs have judgment for their costs herein incurred, and for such other and further relief as may seem just and equitable.

HANNA & MORTON,
Attorneys for Plaintiffs.

[Endorsed]: Filed Jan. 22, 1940. [257]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 448415

PETER J. AKMADZICH and MARY LOUISE
AKMADZICH,

Plaintiffs,

vs.

CITY OF LOS ANGELES, a municipal corpora-
tion, ARTHUR C. HOHMANN, as Chief of
Police of the City of Los Angeles, RAY L.
CHESEBRO, City Attorney of the City of Los
Angeles, et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause coming on regularly for trial in Department 18 of the above entitled Superior Court, on the 18th day of December, 1940, before Honorable Goodwin J. Knight, Judge Presiding, the plaintiff being represented by Messrs. Hanna and Morton, and the defendants being represented by Honorable Ray L. Chesebro, City Attorney of the City of Los Angeles, W. Jos. McFarland, Assistant City Attorney, and John A. Dundas, Deputy City Attorney; and the trial having continued on various days to and including January 10th, 1941; and evidence both oral and documentary having been intro-

duced on behalf of the respective parties; and the cause having been argued and submitted to the Court, the Court now renders [258] its decision, as follows:

The Court finds:

I.

That all of the allegations of Paragraph IV of the complaint are true, except that the property therein referred to consists of approximately sixty-six acres, and that said property, together with the improvements thereon, has a market value in excess of \$125,000, if the said property be operated as a rock crushing and hot mix asphalt plant.

II.

That all of the allegations of Paragraph V of the complaint are true, except that the remainder of the property therein referred to is used for the purpose of storing crushed rock, sand and other materials, and for the purpose of excavating rock therefrom.

III.

That all of the allegations of Paragraph VI of the complaint are true except that it is not true that the property of the plaintiffs is so located that a rock crushing and hot mix asphalt plant can be operated on said premises with less inconvenience or annoyance to residents of the City of Los Angeles or to the general public than at any other place in

the City of Los Angeles where rock deposits are to be found.

It is true that the plant of the plaintiffs is so located that a rock crushing and hot mix asphalt plant can be operated on said premises with as little inconvenience or annoyance to residents of the City of Los Angeles or to the general public as at any other place within the City of Los Angeles where rock deposits are to be found and where rock crushing and hot asphalt plants are operated.

IV.

That all of the allegations of Paragraph VII of the complaint [259] are true, being the allegations starting at line 26, page 4 of the complaint and ending at line 10, page 5 of the complaint.

V.

That under the provisions of Ordinance Number 77,000, referred to in the complaint, the district in which the property of the plaintiffs is located is designated a residential district, with the exception of the area embraced in former Lots 19 and 20 of Tract 999, and that said property, with said exception, under the terms of said ordinance, may be utilized only for single or multiple family dwellings, apartment houses, fraternity or sorority houses, hotels, boarding or rooming houses, clubs, churches, schools, parks, playgrounds, libraries, or professional and home occupations when conducted within

the dwelling or apartment and in which no person not a resident of the premises is employed; or for retail or wholesale business, offices, motion picture houses or theatres, banks, beauty parlors, conservatories, studios (not including motion picture studios), photographic or art galleries, hospitals or sanitoriums (not including animal hospitals); dress-making, shoe or tailor shops; morgues and undertaking establishments; automobile service stations, camps, garages, repair shops, laundries; dancing academies; places of amusement (not including horse, automobile or motorcycle race tracks, riding academies or stables); hand laundries; paint, paper-hanging and decorating shops; carpenter, tinsmith and upholstering shops (not including sheet metal works, cabinet shops or furniture manufacturing shops); household goods storage; newspaper and printing establishments; police and fire station; public utility buildings and uses; public or quasi-public institutions of a philanthropic or eleemosynary nature; farming, the keeping of domestic livestock and the raising of poultry, rabbits, bees, pigeons or other similar enterprises, and buildings incident to such farming, keeping of domestic livestock, raising of poultry, rabbits, bees, pigeons or other [260] similar enterprises.

VI.

That under the terms of Ordinance Number 70,210, referred to in the complaint, the plaintiffs

are prohibited from using their property described in the complaint, outside of the area of former Lots 19 and 20 of Tract 999, referred to in the complaint, for any purpose except for the purposes permitted by Ordinance Number 77,000, referred to in the complaint as hereinbefore set forth.

VII.

That none of the property of the plaintiffs has any value whatever for any other use except for the purpose of excavating rock and operating the rock crushing plant and hot mix asphalt plant in conjunction therewith, referred to in the complaint, and that if such uses of the property be prohibited, it will substantially destroy the value of the plaintiffs' property and result in the practical confiscation thereof.

VIII.

That other rock crushing plants and hot mix asphalt plants operated within the City Limits of the City of Los Angeles are more closely situated to places of human habitation and residential districts than the property of the plaintiffs in this action, and with respect to many of said plants, there are numerous residences and places of habitation nearby and within a distance of from 500 to 1,000 feet thereof, and that some of said plants are entirely surrounded by a closely built residential district. That the land upon which most of said plants are situated could safely be used for and is adaptable to the construction and maintenance of

residences for human habitation. That most of such other plants are situated in an area devoted to such purposes and residential purposes. That some of said plants were operating before the zoning ordinances of the City of Los Angeles were adopted or became [261] applicable to the properties upon which such plants are operated, and that with reference to others of said plants, the City of Los Angeles has adopted ordinances excluding the properties upon which such plants are operated from the residential districts of such city and permitting the operation of said plants.

That there is an area of approximately seventy acres immediately adjoining the property of the plaintiffs in this action, and of the same general type and character, and no farther removed from residences than the property of the plaintiffs, with relation to which the City of Los Angeles has adopted an ordinance permitting the use of said property for the purpose of removing rock therefrom.

IX.

That all of the allegations of Paragraph XIII of the plaintiffs' complaint are true except the third portion thereof, and as to the allegations of said portion, the Court finds that the ordinances referred to in the complaint are discriminatory, in that other property adjoining the property of the plaintiffs and similarly situated and of the same type and character, is classified so as to permit the removal of rock therefrom.

X.

That all of the allegations of Paragraph XIV of the plaintiffs' complaint are true except that the plaintiffs have conducted repair, remodeling and rehabilitation work upon their property and have engaged in other industrial activities upon their property between the hours of 6:30 p.m. in the evening and 6:30 a.m. in the morning, under such circumstances as to constitute an annoyance to surrounding residents.

In this connection the Court finds that if no repairs, remodeling, rehabilitation work or other industrial activity are conducted on the property of the plaintiffs between the hours of 7 p.m. in the evening and 7 a.m. in the morning, with the [262] exception of building a fire in the hot mix asphalt plant and building up steam in said plant, no annoyance will be suffered by the surrounding residents.

XI.

All of the allegations contained in Paragraph VI of the answer of the defendants herein are untrue except as hereinafter otherwise set forth.

It is true that the conduct and operation of the plaintiffs' plant and business creates some noise and a slight amount of dust and fumes, none of which substantially interfere with the enjoyment of the surrounding property, except repair, rehabilitation and remodeling and other industrial operations during the hours from 7 p.m. in the evening to 7 a.m. in the morning hereinbefore referred to.

It is true that as a necessary adjunct and incident

to the plaintiffs' plant and business, large numbers of motor trucks, trailers and other conveyances go to and from said plant, carrying rock and gravel and road paving materials, and that said motor trucks, trailers and other conveyances have at times commenced their operations in the early morning hours and continued throughout the day.

It is also true that said trucks and trailers have raised dust which has settled upon and about the property, homes and places of residence of persons in the neighborhood of plaintiffs' plant and business.

In this connection, the Court finds that the roads used by said trucks, trailers and other conveyances are now in course of being paved, and that when said paving is completed, the said dust will be eliminated.

It is true that the operation of said trucks, trailers and other conveyances creates noise which disturbs, to a certain extent, the peace and quiet of the neighborhood and of the persons [263] residing in the neighborhood or locality of plaintiffs' plant or business, but to no greater extent than the noise of trucks, trailers, automobiles and other vehicles on other roads and highways generally traversing residential areas throughout the urban and suburban districts in the State of California.

XII.

That the allegations of Paragraph XVI of the plaintiffs' complaint are true.

As conclusions of law, the Court finds:

I.

(a) That the ordinances described in the complaint, if enforced against the plaintiffs, will confiscate the property of the plaintiffs described in the complaint;

(b) That the ordinances described in the complaint are unreasonable, arbitrary and oppressive in their application, operation and effect upon the property of the plaintiffs described in the complaint;

(c) That the ordinances described in the complaint unreasonably and arbitrarily discriminate against the plaintiffs in the use of their property described in the complaint;

(d) That the ordinances described in the complaint, in their effect, application and operation upon the property of the plaintiffs described in the complaint, violate the provisions of Sec. 13, Art. I of the Constitution of the State of California;

(e) That the ordinances described in the complaint, in their effect, application and operation upon the property of the plaintiffs described in the complaint violate the provisions of Sec. 14, Art. I of the Constitution of the State of California;

(f) That the ordinances described in the complaint, in their effect, application and operation upon the property of the plaintiffs described in the complaint, violate the provisions of [264] Sec. I of the Fourteenth Amendment to the Constitution of the United States.

II.

That an injunction should be issued, enjoining the defendants and each of them, their agents, representatives, servants and employees from enforcing said ordinances against the plaintiffs in the present use and operation of the property of the plaintiffs described in the complaint, and from taking any action under or pursuant to said ordinances which would interfere with the plaintiffs in the operation of the rock crushing plant, hot mix asphalt plant and excavations referred to in the complaint; said injunction to remain in force and effect so long and during such time as the plaintiffs shall refrain from conducting any repair, remodeling, or rehabilitation work or other industrial activities upon their said property between the hours of 7 p.m. in the evening and 7 a.m. in the morning, with the exception, however, of building a fire in the hot mix asphalt plant and building up steam in said plant. That plaintiffs should be enjoined from operating their hot mixed plant, rock crusher or other parts of their plant on the holidays described in the judgment signed and filed herewith.

III.

That the temporary injunction heretofore issued in this action should be continued in force until the permanent injunction hereinbefore referred to shall become effective.

IV.

That the plaintiffs should have judgment for their costs herein incurred.

Done in Open Court this 30th day of January, 1941.

/s/ GOODWIN J. KNIGHT,
Judge.

[Endorsed]: Filed Jan. 30, 1941. [265]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 448415

PETER J. AKMADZICH and MARY LOUISE
AKMADZICH,

Plaintiffs,

vs.

CITY OF LOS ANGELES, a municipal corpora-
tion, ARTHUR C. HOHMANN, as Chief of
Police of the City of Los Angeles, RAY L.
CHESEBRO, City Attorney of the City of
Los Angeles, et al.,

Defendants.

JUDGMENT

The Court having heretofore rendered its decision in writing in the above entitled action, now, therefore, it is ordered, adjudged and decreed:

I.

That the defendants and each of them, their agents, representatives, servants and employees be and they are hereby enjoined from enforcing the ordinances described in the complaint on file herein, against the plaintiffs, in the present use and operation of the property of the plaintiffs described in the complaint, and from taking any action under or pursuant to said ordinances which would interfere with the plaintiffs in the operation of the rock [266] crushing plant, hot mix asphalt plant and excavations referred to in the complaint.

This injunction shall remain in force and effect so long and during such time as the plaintiffs shall refrain from conducting any repair, remodeling or rehabilitation work or other industrial activities upon their said property between the hours of 7 p.m. in the evening and 7 a.m. in the morning, with the exception, however, of building a fire in the hot mix asphalt plant and building up steam in said plant.

The Clerk shall issue a writ of injunction pursuant to the provisions hereof.

II.

The temporary injunction heretofore issued in this action is continued in force until the permanent injunction herein provided shall become effective.

III.

It is further ordered, adjudged and decreed that the plaintiffs and each of them, their agents, representatives, servants and employees, are restrained and enjoined from operating the hot mix asphalt plant and the rock crusher, or from making repairs, additions and rehabilitations thereon and thereto, upon Sundays, Christmas Day, New Year's Day, Memorial Day, the Fourth of July, Labor Day, and Thanksgiving Day.

IV.

Plaintiffs shall recover of and from the defendants the costs of plaintiffs expended herein, taxed at the sum of \$76.75.

One in open court this 30th day of January, 1941.

/s/ GOODWIN J. KNIGHT,
Judge.

[Endorsed]: Filed Jan. 30, 1941. [267]

Received copy of the within affidavit of Donald J. Dunne this 1st day of December, 1947.

OLIVER O. CLARK,
By /s/ M. BAILUS,
Attorney for Plaintiffs.

[Endorsed]: Filed Dec. 1, 1947. [268]

In the United States District Court, Southern
District of California, Central Division

No. 7765—P. H.

HENRY WALLACE WINCHESTER, et al.,
Plaintiffs,

vs.

J. D. GREGG, and the CITY OF LOS ANGELES,
a Municipal Corporation,

Defendants.

AFFIDAVIT OF HAROLD A. HENRY AND
J. WIN AUSTIN ON BEHALF OF DE-
FENDANT CITY OF LOS ANGELES IN
OPPOSITION TO PRELIMINARY IN-
JUNCTION

United States of America,
State of California,
County of Los Angeles—ss.

Harold A. Henry and J. Win Austin, each being
first duly sworn, depose and say:

We are now and during all the times hereinafter
stated were duly elected, qualified and acting mem-
bers of the City Council of the City of Los An-
geles, a municipal corporation of the State of Cali-
fornia, one of the defendants in the above-entitled
action. At the present time affiant Harold A. Henry
is the president of said City Council and a mem-
ber of its Planning Committee. Both affiants dur-
ing all the times hereinafter stated, were [269] two
of the three members of the Planning Committee

of said City Council, the same being one of the duly constituted and regularly appointed standing committees of said City Council to which the said City Council, in the ordinary conduct of its functions, refers matters pending before it pertaining to city planning, zoning and related matters, for purposes of investigation, consideration and recommendation. One Carl C. Rasmussen who was the third member of said Planning Committee during the times hereinafter stated is no longer a member of said City Council.

On or about August 1, 1946, the defendant John D. Gregg appealed to said City Council from a decision of the Planning Commission of said city denying an application theretofore made by said Gregg to said commission for a conditional use permit to excavate rock, sand and gravel upon certain properties owned by him in the San Fernando Valley district of said city and more particularly described in the complaint of the plaintiffs herein. Said application was made by said Gregg under the provisions of Section 12.24 of Ordinance No. 90,500 of said city, being the comprehensive zoning ordinance of said city referred to in the complaint of the plaintiffs herein. On August 8, 1946, said City Council duly referred the matter of said appeal to said Planning Commission for a report concerning its action in the matter of said application. On or about August 20, 1946, said Planning Commission in writing reported to said City Council concerning its action on said application. On August 23, 1946, said City Council duly referred the matter

of said appeal and said report of the Planning Commission to its said Planning Committee, of which we were then members as aforesaid.

Thereupon said Planning Committee duly, regularly and thoroughly considered and investigated the matter of said application and said appeal and in the course of said investigation considered all documentary evidence theretofore submitted to said Planning Commission by and on behalf of said applicant John D. Gregg and by and on behalf of all persons protesting the granting of his said application and also considered documentary evidence submitted to said committee by and on behalf of said Gregg and said protestants. A portion of the documentary evidence so submitted to said committee by said John D. Gregg and considered by said committee, consisting of various documents and maps, is attached hereto and marked Exhibit "A."

In the course of its investigation and consideration of said application and appeal said committee on two occasions visited and inspected the lands covered by said application and the lands and properties shown on the map, Exhibit "A," attached to the complaint of the plaintiffs in this action and therein designated as the "community area," and the rock, sand and gravel plant of said John D. Gregg adjacent thereto. One of said visits of inspection was made in the company and under the direction of representatives of said John D. Gregg and one of said visits was made in the company and

under the direction of representatives of persons protesting the granting of said permit so applied for by Gregg.

In the course of its investigation and consideration of said application and appeal said committee gave notice of and held a public hearing thereon as required by Sections 12.25-C and 12.32-C of Ordinance No. 90,500 of said City. Notice of said hearing was sent by mail, as required by said ordinance, to all persons owning real property within a radius of 300 feet of the exterior boundaries of the property covered by said application. Said hearing was attended by many representatives of and witnesses for said John D. Gregg and said protestants respectively, evidence, both oral and documentary, was submitted by and on behalf of the respective parties and said hearing was conducted fully, fairly and impartially to both sides of the controversy. [271]

It was disclosed to said committee by the evidence presented to it as aforesaid and by its said investigations, that many millions of tons of rock, sand and gravel are consumed annually by the City of Los Angeles and by many private users, in the construction of highways, bridges, dams and buildings of all sorts and that the demand for said materials is constantly increasing; that there are only two adequate sources of supply of such material near the City of Los Angeles, namely, the area in the San Fernando Valley district in the vicinity of the property covered by said application and another area in the San Gabriel Valley

some 15 or 20 miles to the east of said San Fernando Valley area; that the lands in said San Fernando Valley area, then available for the production of said materials, and so zoned as to permit such production, were nearing exhaustion, as a consequence whereof the cost of said materials, delivered to points in the San Fernando Valley and to points in the general westerly part of the City of Los Angeles, would be materially increased by reason of the fact that the same would have to be supplied from said San Gabriel Valley district and would necessarily involve a largely increased cost of transportation, said increase being estimated at approximately \$1.00 per ton; that the City of Los Angeles alone consumes about 26,000 tons of such materials per month, the great majority of which are processed by said city at plants located near said San Fernando Valley area of production.

Thereupon and after full and thorough consideration of all the evidence submitted to it as aforesaid and the facts disclosed by its said investigation and arguments presented by and on behalf of the respective parties to the controversy, said committee, upon the basis of said evidence, facts and arguments, on or about October 2, 1946, reported to said City Council in writing, a copy of said report being attached hereto and marked Exhibit "B." [272]

Said City Council, assembled in regular meeting on October 2, 1946, conducted a further public hearing upon the matter of said application and said appeal which was attended by representatives of and

witnesses for the respective parties to said controversy, both the applicant and the protestants, and heard and considered evidence both oral and documentary by and on behalf of both of said parties. Said last mentioned hearing was held by said City Council despite the fact that no such hearing was required by said Ordinance No. 90,500. Said City Council adopted said report of said committee and thereby authorized the granting of said conditional use permit to said John D. Gregg upon the terms and conditions set forth in the said report of said committee, all as set forth in paragraph numbered XXI of the complaint of the plaintiffs herein.

It is not true that the actions of said Planning Committee in investigating and considering the matter of said application and said appeal or in conducting said public hearing thereon, or in reporting as aforesaid to said City Council, or the action of said City Council in conducting said public hearings held before it, or in considering said report or in adopting and approving same or in authorizing the issuance of said permit, were arbitrary, unreasonable, unfair, unjust or oppressive, or repugnant to the concept or objections of the master zoning plan of said city or subversive of the public welfare, health and safety; nor is it true that any of said actions were done or taken for the purpose of preferring said John D. Gregg as against any other property owners within said community area in the use and enjoyment of their properties or for the purpose of enabling said Gregg to expand his operations without removing

his facilities to a different location. On the contrary it is true that all of said actions were had and taken with a view to the preservation and protection of the rights of all interested private parties and with a further view to serving [273] the needs of the public generally and of the City of Los Angeles, particularly in view of its present vast expansion of population and territory, for rock, sand and gravel to be used for the necessary construction purposes aforesaid. The conditions upon which said permit was granted by said City Council, as contained in the said report of its said Planning Committee, with respect to the manner and method of said Gregg's operations upon said property, were inserted therein solely for the purpose of protecting the plaintiffs in this action and all other persons residing in the neighborhood against danger or offensive conditions arising from such operations.

/s/ HAROLD A. HENRY,

/s/ J. WIN AUSTIN.

Subscribed and sworn to before me this 24th day of November, 1947.

/s/ CHAS. D. WILLIAMS,

Notary Public in and for Said
County and State.

My Commission Expires March 21, 1949. [274]

EXHIBIT A

APPEAL TO CITY PLANNING COMMITTEE
OF CITY COUNCIL, CITY OF LOS AN-
GELES, FROM THE DECISION OF THE
CITY PLANNING COMMISSION

Case of John D. Gregg

September, 1946.

City Planning Committee
of the City Council,
City of Los Angeles,
City Hall,
Los Angeles 12, California.

Gentlemen:

In order to attempt to furnish a convenient method by which the individual members of the City Planning Committee may familiarize themselves with the facts and circumstances surrounding the application of John D. Gregg for a permit to use certain lands lying northeasterly of Glen Oaks Boulevard between Pendleton and Wicks Streets in the Roscoe area, for the purpose of mining rock, sand and gravel, which said application is now on appeal before your Honorable Body, this Memorandum is submitted. It will include the following:

1. List of Witnesses.
2. List of Business Organizations Which Have Endorsed the Application of John D. Gregg.

3. List of Individuals and Companies Which Have Endorsed the Application of John D. Gregg.
4. List of Exhibits.
5. Summary of Conclusions.
6. Questions Discussed. [277]

List of Witnesses:

1. Conrad McKelvey, Area Director of the National Housing Agency. His immediate superior is Wilson W. Wyatt. Mr. McKelvey's offices are located at 9th and Hill Building, 315 West 9th St., Los Angeles.

2. Howard Holtzendorff, Director of Housing Authority, City of Los Angeles, 1401 E. 1st St., Los Angeles.

3. Ernest Orfila, Attorney at Law, Chairman of the Board of Directors of Department of Veterans of the State of California, 206 S. Spring Street, Los Angeles.

4. Herman Cortelyou, Director of Maintenance and Sanitation Bureau, Department of Public Works, City of Los Angeles, City Hall, Los Angeles.

5. H. A. Holm, Purchasing Agent, City of Los Angeles, City Hall, Los Angeles.

6. A. G. Shaw, Manager, Associated General Contractors of America, Southern California Chapter, Los Angeles.

7. Edward A. Sills, Secretary-Manager, Building Contractors Association of California, 121 So. Alvarado Street, Los Angeles.

8. George Mannschreck, Secretary, Contracting Plasterers' and Lathers' Association of Southern California, 564 Chamber of Commerce Building, Los Angeles.

9. J. R. Keane, President, Western Asphalt Association, 515 S. Flower St., Los Angeles.

10. E. P. Ripley, President, General Concrete Products Company, and President, Concrete Masonry Manufacturing Association, 15025 Oxnard St., Van Nuys.

11. Kay Greer, President, Associated Paving Contractors of Southern California, 11803 Gilmore Street, North Hollywood.

12. H. C. Mathers, Secretary, L. A. Brick Exchange, Los Angeles.

13. J. A. McNeil, General Contractor, The J. A. McNeil Company, 910 Olympic Boulevard, Los Angeles; also Director of Associated General Contractors of Southern California.

14. L. Glenn Switzer, Manager, Transit Mixed Concrete Company, Pasadena. [278]

15. Ray Best, President, Southwest Paving Company.

16. Harold Judson, Attorney at Law, representing Mr. Best.

17. Robert Mitchell, President, Consolidated Rock Products Company.

18. Harry Jumper, Engineer, Consolidated Rock Products Company.

19. Eugene Cox, Jr.

20. Ralph Cornell, Landscape Architect and Designer of Contemplated Civic Center.

21. John Knight or Louis M. Solomon, representing Knight and Parker California Associates, Subway Terminal Building, Los Angeles.

22. Emil Pozzo, Pozzo Construction Company, 2403 Riverside Drive, Los Angeles.

23. Harry Morrell, Sunland, Calif.

24. C. M. Barber or Hugh Barnes, District Engineer and Manager, respectively, of Portland Cement Association.

25. Francis Baird, Cooperative Building Materials of Los Angeles.

26. Frank S. Smith, President, Mason Contractors Exchange of Southern California.

27. Roland McFayden, Chairman, County Counsel Veterans' Housing Committee.

28. John G. Gregg, the applicant. [279]

List of Business Organizations Which Have
Endorsed the Application of John D. Gregg

Associated General Contractors of America,
Southern California Chapter.

Building Contractors Association of California.

Building Contractors Association of California,
San Fernando Chapter.

Building Contractors Association of California,
Glendale-Burbank Chapter.

Contracting Plasters' and Lathers' Association
of Southern California.

Concrete Masonry Manufacturing Association.

Masons' Exchange of Southern California.

L. A. Brick Exchange.

Western Asphalt Association.

United Brotherhood of Carpenters and Joiners of America, Local Union 1913, San Fernando Valley, Van Nuys.

Portland Cement Association.

Sherman Oaks Chamber of Commerce.

Van Nuys Chamber of Commerce.

Teamsters Joint Council American Federation of Labor. [280]

List of Individuals and Companies Which Have Endorsed the Application of John D. Gregg

Alden Building Material Co., 1647 West Slau-son Avenue, Los Angeles.

R. F. Rasey, as President of Associated General Contractors of America, Southern California Chapter, 707 Architects Building, Los Angeles.

E. J. Butterworth, 11200 Penrose St., Roscoe.

David J. Bourdon of the David Bourdon Lumber Co., 5310 Vineland, North Hollywood.

Burbank Builders Supply, 200 So. Victory Blvd., Burbank.

Canoga Park Lumber Co., 21339 Saticoy St., Canoga Park.

Eclipse Plaster Company, 133 E. Jefferson Blvd., Los Angeles.

Encino Lumber Co., 16917 Ventura Blvd., Encino.

The FMC Corporation, 9274 Santa Monica Blvd., Beverly Hills.

F. R. Foss of F. R. Foss Building Materials, 9421 So. Vermont, Los Angeles.

John W. Fisher Lumber Co., 14th St., and Colorado Ave., Santa Monica.

Fox-Woodson Lumber Company, 714 E. California Ave., Glendale.

General Concrete Products, 15025 Oxnard St., Van Nuys.

Gordon Materials Co., 7346 Santa Monica Blvd., Los Angeles.

Graystone Tile Company, 7040 Lankershim Blvd., No. Hollywood.

Hagen Materials Co., 943 Aviation Drive, Glendale.

Hammond Lumber Company, 7233 Deering Ave., Canoga Park.

Hill Co., 5815 So. Normandie Ave., Los Angeles.

L. R. Hasiwanter, 8719 El Tovar Place, Los Angeles.

Jake M. Kyle, 1730 Glenwood Road, Glendale.

Ott L. Lewis, 1821 Clark Ave., Burbank. [281]

Mutual Building Material Co., 9272 Santa Monica Blvd., Beverly Hills.

Quality Paint & Garden Supply, 721 No. La Brea, Inglewood.

Southwest Paving Company, 11402 Tuxford Ave., Roscoe.

Transit Mixed Concrete Company.

Westside Building Material Co., 8845 Washington Blvd., Culver City.

Westwood Building Material Co., 11246 West Pico Blvd., Los Angeles.

Valley Brick & Supply Co., 6100 Sepulveda Blvd.,
Van Nuys.

Victory Materials Company, 254 West Olive Ave.,
Burbank.

Acts of Chambers of Commerce

Previously the Encino Chamber of Commerce, the Reseda Chamber of Commerce and the North Hollywood Chamber of Commerce had adopted resolutions supporting the stand of the Roscoe Chamber of Commerce opposing this application. After an investigation was made each of the above, except the Roscoe Chamber of Commerce, rescinded their action and have expressed in writing the result of that action. The action of the North Hollywood Chamber of Commerce was not taken until after the hearing before the Planning Commission. By a vote of fifteen to two the board of directors of the North Hollywood Chamber of Commerce announced that they do not oppose the application of John D. Gregg.

On September 19, 1946, the Board of Directors of the Los Angeles Chamber of Commerce considered this question and by resolution urges the city council to appropriate action. [282]

List of Exhibits

1. An aerial map of the area involved in the application showing the relationship of the location of John D. Gregg's plant to the property involved in the application. Said map is attached hereto and marked Exhibit "A."

2. A map prepared by the staff of the city planning department from a map previously prepared by the "soil survey of the San Fernando area, U. S. Department of Agriculture," showing location of the San Fernando cone. Said map is attached hereto and marked Exhibit "B."

3. A map prepared by the staff of the city planning department purporting to show the surface area of the acreage now zoned in Zone M 3, where where the mining of rock, sand and gravel is permitted, including the area covered by injunction restraining the City of Los Angeles from enforcing the provisions of the zoning ordinance which prohibits the mining of rock, sand and gravel in the said area. Said map is attached hereto and marked Exhibit "C."

4. A computation showing available tonnage on 451 zoned acreage. Said computation is attached hereto marked Exhibit "C-1."

5. A chart illustrating the ratio of per capita consumption of rock, sand and gravel, showing the market demand per capita based on population of Los Angeles county. Said chart is attached hereto and marked Exhibits "D" and "D-1," together with a chart from 1917, with estimates of future population.

6. A schematic diagram of cross section of San Fernando rock cone illustrating rock deposits and excavated areas. Said diagram is attached hereto and marked Exhibit "E."

7. A map showing the Gregg plant property, plant area, stock pile area and mineable land. Said map is attached hereto and marked Exhibit "F."

Summary of Conclusions

1. The rock, sand and gravel business is a lawful and useful business.

2. The deposits of sand and gravel that can be mined under existing regulations are limited. Only a maximum of 70,000,000 tons remains in property presently zoned for mining in the San Fernando valley area, and all of this tonnage is not available.

3. The present rate of consumption from the San Fernando Valley is about 4,000,000 tons per annum.

4. All estimates point to a demand of over 10,000,000 tons per annum from the San Fernando Valley.

5. If reserves are not made available plants can not be expanded to meet the demand.

6. The land involved in the application and the land in the area is not desirable for residential purposes.

7. Excavated land can be utilized for many beneficial purposes. [284]

Questions Discussed

It is taken for granted that the rock industry is essential and that the available supply of rock, sand and gravel is necessary for the welfare of any community. The City of Los Angeles finds itself in one of the most fortunate positions, with reference to its supply of rock, sand and gravel, of any large community in the United States. There are two principal deposits in the County which contain this

basic material. They are: the deposit located near Azusa in the County of Los Angeles, generally known as the "San Gabriel Cone" and the deposit located near Roscoe in the San Fernando Valley, generally known as the "San Fernando Cone." These two deposits are unique for the reason that they are located close to the market and points of consumption. Thus the City of Los Angeles and the County of Los Angeles are in the extraordinary fortunate position of having a cheap source of supply for one of the most basic of all building materials. Other large cities find it necessary to transport rock from great distances and consequently pay many times the price that rock costs in this area.

Up until the current abnormal situation induced by World War II, building in Los Angeles County was notoriously cheap. One of the factors that contributed to this low cost of building was the availability of rock aggregate.

The rock industry has been operating in the San Fernando Cone since the year 1909. Up until the advent of zoning the rock industry was located wherever the fancy of a particular operator desired. So plentiful was the supply. The growth of the City of Los Angeles after World War I demanded some kind of comprehensive planning. In 1920 the City of Los Angeles adopted Ordinance 33173 which is known as the "Residential District Ordinance." That ordinance provided in effect that all property then in use might be used for the purpose to which it was then devoted and all other property was resi-

dential property. The City grew, population doubled, floods came and soon it was necessary to establish flood control projects. Since the best rock lands are necessarily in the path of wash-ways, it was necessary in order to provide for flood control channels that hundreds of acres be withdrawn from the development for the basic aggregates and devoted to flood control projects. The development of the City has been such that zoning, which is designed to preserve the best uses of the land and to promote the most ultimate good for the public generally and protect the general public welfare, has created a condition where we now find that, unless a forward looking picture is established, the City of Los Angeles, like other cities, will be forced to transport rock and sand for many miles. It will be required to pay many times the present cost for that which we have in our own back yard. We will be placed in the position of carrying coals to Newcastle because we do not protect one of our great natural resources. [285]

Does the welfare of the City of Los Angeles demand that the natural resources available only where found be developed for the use and benefit of the community at large or will we permit these resources to be destroyed by the encroachments of unnecessary residential development?

I say an unnecessary residential development for the following reasons: There are thousands of acres of vacant land in the City of Los Angeles and the County of Los Angeles where residences might be constructed which are far more desirable for such

use than the land in question. It is a matter of common knowledge that residential buildings will somehow be constructed anywhere if adequate restrictions are not placed thereon. Residences have been constructed on sheer cliffs, over swamps and in river bottoms, where more desirable land was available nearby. Such is the nature of man.

To the question above I will ask:

1. Where does the City of Los Angeles and the County of Los Angeles obtain its rock, sand and gravel?

There are two primary sources of rock, sand and gravel that serve the County of Los Angeles. They are the "San Fernando Cone" and the "San Gabriel Cone." Both are termed by the rock industry as base points. The San Fernando Cone serves that portion of the County of Los Angeles lying west of Main Street in the City of Los Angeles. The San Gabriel Cone serves that portion of the County of Los Angeles lying east of Main Street in the City of Los Angeles.

2. In so far as the area in question is concerned, the San Fernando area, how much material is available in the San Fernando Cone located in the zone where the mining for rock, sand and gravel is permitted, namely, the M 3 zone?

As of this writing there are 451 acres of land in the San Fernando Cone that is zoned M 3 and the mining of rock, sand and gravel in said area is permissible. (See Exhibit "C"). This figure of 451 acres is the figure accepted by the Department of City Planning as being zoned M 3 in the San Fer-

nando Cone. Examination of Exhibit "C" will disclose that this 451 acres merely includes the surface area of the property and does not allow for the land necessary for plant structures, stock piles, or land that cannot be mined by reason of the necessity of maintaining a slope ratio which will be adequate to prevent slides or cave-ins, which ratio should be at least one foot to one foot of decline. [286]

The 451 acres measured at the surface as indicated on Exhibit "C" are designated by letters. These letters indicate the ownership of all parcels in the area. In order to compute the net acreage available as reserves after making provision for adequate area for stock piles, plant facilities and necessary slopes, we have prepared and caused to be attached hereto a chart. See Exhibit "C-1."

In computing the amount of the area which is necessary in order to provide for slopes, plant space and stock piles we have used the method shown in Exhibit "C-1."

We Find That 310 Acres Not 451 Acres Are Available for Mining.

How Many Tons of Rock, Sand and Gravel Are Available for Production from the San Fernando Cone Under Existing Zoning Regulations?

There Are Approximately 200,000 Tons of Rock, Sand and Gravel in a Net Mineable Acre of Land, Dug to an Average Depth of Approximately 90 Feet. This Figure Varies Slightly but Not Sufficiently to Make Any Material Difference. 310 Times 200,000 Tons Gives Us 62,000,000 Tons, but Let Us Be a Little More Liberal and Say That This Figure Will Not Exceed 70,000,000 Tons.

Close inspection of Exhibits "C" and "C-1" demonstrates several definite situations:

First: There is a Maximum of 70,000,000 Tons Available in Zoned Reserves.

Second: Only Certain Properties Are Available to Particular Companies or Operators.

Third: 35,000,000 Tons Have Either No Plant Facilities or in Two Cases Have Portable Plants with Limited Production. [287]

Fourth: 12,000,000 Tons Are Devoted to Other Industrial Uses or Are Owned by Persons Not Connected with the Rock Industry.

Fifth: Only 23,000,000 Tons Are Available for Mining by Existing Plant Facilities.

Sixth: These 23,000,000 Tons Constitute a Piti-fully Small Supply Since a Majority of the Land Is Under the Control of One Company with a Production Capacity of Approximately 1,800,000 Tons Per Year.

Thus, We Have Two Problems:

First: We Must Utilize All of Our Present Pro-ductive Facilities, and

Second: Provide Adequate Reserves to Justify Expansion and Thereby Avoid a Real Bottleneck in the Near Future.

Today's Problem

As of June 30, 1946, the production of sand and gravel in Los Angeles County has reached almost 10,000,000 tons, of which approximately 40% was produced from the San Fernando Cone. However, throughout the history of the rock industry about

50% is produced from the San Fernando Cone and the other 50% from the San Gabriel Cone.

This production was made possible only by some of the operators on an overtime basis and extending their operations beyond their economic capacity. As of June 30, 1946, the Gregg plant was furnishing materials to the market at a rate which exceeded 1,200,000 tons a year. The Gregg plant is not, at the present time, mining rock. A shut-down was made necessary by reason of the fact that Mr. Gregg has considerably less than four acres of mineable property, which, if dug at the rate of 100,000 tons a month, would be exhausted in not to exceed six months. [288]

A diagram of the Gregg property now zoned showing his plant area, the stock pile area and mineable lands, is attached hereto and marked Exhibit "F." An examination of this Exhibit will illustrate the amount of area necessary to operate a plant's fixed installations, and the area necessary for stock piles. Ultimately, when the plant is to be abandoned this area may be mined. Mining of such area precludes further use of the plant and eliminates production capacity.

Financial conditions controlled by capital investment and current taxes will not permit Mr. Gregg to dig out his remaining property and liquidate his plant and plant installations in so short a time.

Nevertheless, in order that the demand of the market may be met to the fullest extent possible, Mr. Gregg caused part of his entire crew, together

with his rolling stock, to be transferred to Consolidated Rock Products Company, so that they might have additional facilities to help supply the market; likewise, he is permitting his plant to be operated for the purpose of processing and grading rock, sand and gravel dug elsewhere and hauled to his plant by truck. The results have been that most of his crew remains employed and the demands of the market have, in some measure, been met.

The Situation in Which Mr. Gregg Finds Himself Is Characteristic of, and but an Illustration of, the Condition in Which Other Members of the Rock Industry Will Be Placed in a Comparatively Short Time, if Zoning Problems Concerning the Industry Are Not Met and Met Now. To Meet the Demands of the Current and Future Market Every Available Production Facility Must Be Not Only Maintained but Must Be Expanded. Capital Investments in the Industry Must Be Made. No Business Can Be Expected to Expand Production, Increase Its Capital Investment and Then Drive Itself Out of Business. An Industry Must Have Large Raw Material Reserves or Financing Will Not Be Available. It Must Know That It Will Have Sufficient Raw Material Available to Justify Expansion and Furnish Reasonable Assurance of a Return of the Capital Invested. It Must Know, as Must the Textile Manufacturer or Any Other Manufacturer, What the Source of Raw Material Is. In This Case the Rock Is Available if the Authorities Act.

City Authorities Will Act

I am Sure That the City Authorities Will Recognize This Situation and Provide Means Whereby the Industry Will Be Aided in Its Program to Meet the Needs of the People of the City and County of Los Angeles, Rather Than Taking an Action Restricting the Operation of the Industry. Available Production Capacity Should Be Utilized to Its Fullest Extent Now. Necessary Permits Authorizing the Use of Reserve Lands and Additional Zoning Should Be Granted so That Operators May Be Assured of a Reasonable Chance to Regain Their Capital Invested.

Having shown the quantity of material available in the San Fernando Cone, and the necessity for making additional [290] material available for mining, we are concerned with the next question:

What Are the Demands of the Market, and How Long Will the Existing Reserve Supply Last?

To answer this question, we have obtained information from every reliable source at our disposal. Sources of information include: The Regional Planning Commission of Los Angeles County, Los Angeles Chamber of Commerce, U. S. District Court Bankruptcy Case No. 25816-H, and the findings of the Examiner made therein, and surveys made by Westinghouse Electric Company, based on surveys made by more than twenty organizations, plus their independent survey.

The Westinghouse Electric Company's survey states:

“According to 78% of Our Leading Statisticians, Los Angeles Is Destined to Become the World’s Largest City Sometime Between 1960 and 1975.”

In order to become the world’s largest city, the present population must more than triple its present population.

In order to attempt to compute the tonnage of rock necessary to furnish the market demand within the foreseeable future, we have ascertained the ratio of rock consumption to existing population between the years 1920 and the date hereof. (See Exhibits D and D-1.)

Examination of these exhibits will disclose such a ratio for all years between 1917 and 1945, excepting only the years 1941, 1942 and 1943. The figures for these years are not available. Further examination of the exhibit will disclose that during the years 1920-1929 inclusive (the previous largest building period in Los Angeles’ history) rock products were consumed in Los Angeles County at an annual average rate of 4.54 tons per capita. The highest consumption was reached in 1924 with a rate of 6.13 tons per capita.

The average annual population in the 1920 decade was 1,623,000 persons. Translated into tons per capita we find an average annual consumption of 7,712.668 tons.

At the beginning of the 1944-1954 decade the population was 3,225,000. The estimates of reliable sources indicate that the population in 1954 will be at least 4,270,000. Accepting that figure we find that the average annual population would be 3,785,-

000. Now assume that we will require at least the 1920-1929 average, i.e. 4.54 tons per capita, the minimum annual production would have to be 17,183,000 tons, with a production rate of 19,385,000 tons in 1954. [291]

The above figures are estimated averages only. They do not consider peak production or consumption. The peak will of necessity be as large as the 1920-1929 peak which was 6.13 per capita in 1924. In 1924 the population was 1,509,318, production was 9,216,000 tons.

6.13 tons per capita based on the 1945 population of 3,320,000 would require about 20,351,000 tons.

In 1925 the population of the County was 1,864,735. Today the population of the City is just about the same figure. In 1925 the production was 10,000,000 tons or 5.37 tons per capita. Present consumption is at the rate of 10,000,000 tons in the entire county with the population figure in 1945 of 3,320,000 and yet our consumption rate is only 2.90 tons per capita.

It takes little imagination to see what the demands of the market will be once materials generally become available.

If we stop to realize that during the 1920's housing foundations were for the most part merely an exterior frame with the interior supported by 18' pyramids; while today interior supports must be solid; if we stop to realize that the type of construction required or done twenty years ago was relatively light when compared to the demands of today; if we stop to realize that we have the greatest

housing shortage that we have ever witnessed; that all agencies of government and business interests generally are doing their utmost to speed production; that no class A office buildings have been built since about 1930; that no first class hotels have been built since about 1938; that hundreds of miles of streets, highways, freeways, and sidewalks must be constructed; that airport officials have difficulty in planning to keep airports in pace with aircraft development; that 10,000 foot ways are required today; that commercial building must keep pace with residential building; that factories must and will be built; then we are forced to conclude that an average per capita consumption of rock products, during the next ten years, will be many times greater than the 1920-1929 average. Modern architecture demands greater use of rock, sand and gravel. And yet our present consumption rate is only 2.9 tons per capita.

This exhibit will also disclose another interesting situation:

In 1919, the first year after World War I, the consumption rate was 1.24 tons per capita. In 1920 the rate grew to 2.47 tons per capita, and climbed steadily until the peak was reached in 1924 at 6.13 tons per capita.

In 1945 the rate was 1.70 tons, today it is 2.9. We can expect a steady climb until a peak is reached; when that peak will come is not foreseeable. But it is reasonable to assume that a pattern similar to that of the 1920's may be [292] followed and that the peak of at least 6.13 tons will

be reached by 1949 or 1950. We find that we will have to produce about 24,000,000 tons; 15,000,000 more tons than we produced in 1924. Two and one-half times as much as we are consuming today.

Where Will We Get the Rock?

Lessons of the Past

One of the lessons that the United States learned in World War II was that the only way to prevent critical shortage of material was to act before the shortage occurred. There was no shortage of munitions until we needed them.

Today, the Gregg plant is intact. Mr. Gregg is ready to start expansion. Necessary materials to expand operations have been on order for months. To force him to curtail operation is to deprive the market of over 1,200,000 tons per year.

But New Plants Cannot Be Built Within Two Years. We Must Protect What We Have Now and Plan for the Future.

What Use Can Be Made of the Land?

What use can the land involved in the application be put, if it is not used for the mining of rock, sand and gravel?

I will stipulate that the land in question can be used for residential purposes. I repeat, residential buildings can be placed almost anywhere. But the mere fact that residential buildings are so placed does not make the land desirable residential property. Marginal lands, river bottoms, cliffs and

swamps may be used for residential purposes, and frequently are so used, because such land is cheap and undesirable. In order to ascertain whether or not this land was desirable residential land, Mr. Gregg made application to the Federal Housing Authority for approval of a subdivision of the land in question for a mortgage-insured loan. This application was rejected by the Federal Housing Authority, with a statement that the land did not meet the qualifications of the Federal Housing Act for a mortgage-insured loan.

A letter from the Federal Housing Authority covering this subject is on file in this case.

Also, Mr. Gregg caused an application to be made through a veteran of World War II for a bank loan covering the construction of an authorized veteran's home, on a part [293] of the land in question. His application was made through the Security-First National Bank of Los Angeles, Burbank Branch, and was rejected. A letter from the bank stating its reasons for its rejection is on file in this case.

The opponents make this suggestion:

Sub-divide the land into six lots per acre; the Planning Commission standard is about five lots to the acre (minimum), sell these sub-standard lots for \$1500.00 each, and build \$4500.00 houses on the same.

At the present market, \$4500.00 will build a house of about 600 square feet without necessary out-buildings, such as garages.

Opponents prove exactly that—that marginal land can be used for the cheapest kind of housing, and create a condition which would soon become known as a blighted area.

We offer to use the land for the purpose of serving public generally.

The opponents propose to use Mr. Gregg's land for the purpose of creating a blighted area and sub-standard housing.

Aesthetic Considerations

Whenever any question arises concerning zoning, the aesthetic considerations are always evident, even though aesthetics, as such, have no basis at law. The business of mining of rock, sand and gravel is a lawful and useful occupation and cannot be prohibited by legislation unless such legislation is necessary for the protection of legal rights.

The Superior Court of the State of California, in *The People v. Hawley*, 207 Cal. 395, stated:

“No authority is required to support the proposition that the business of excavating rock and gravel by the owner of lands belonging to him is a lawful and useful occupation and cannot be prohibited by legislation, except in cases where the enactment of such legislation may be found necessary for the protection of legal rights of others.”

That case recognizes the proposition that although legislation which prohibits the mining of rock and gravel might be legal under certain circumstances

it would not of necessity injure a recognizable legal right of another person. To deny this permit would not be an attempt to regulate but would be absolutely prohibiting the operation of a business that can be operated in such a manner that no one else's legal rights are affected. [294]

It must be admitted that the excavation of rock, of necessity, leaves a large hole in the ground; that to some extent large excavations do offend the aesthetic senses of some people. It must be admitted that the rock industry is a heavy industry and requires heavy machinery to move the processed rock and as a result heavy trucks are utilized for that purpose. Consequently the question has always arisen:

After the Land Is Fully Excavated, What Will Happen to the Land?

It is contended by some that these excavations are eye sores, that the value of the land itself is diminished and cannot serve any useful purpose to the community; that when the resources contained in the deposit are exhausted the rock operators abandon the property and let nature take its course; that the existence of excavations diminishes the property value of the surrounding property. These contentions are without merit. Industry's conception of its duty or obligations to the community has changed in the last twenty years. Modern planning demands that thought be given to the future.

First: Excavations may be used by the Municipal authorities as dumps for either combustion or non-combustion rubbish.

Second: Excavations may be used for the purpose of providing dumping places for materials necessarily excavated as the result of construction. Dumps, of course, are not the most desirable use to which any property could be put from aesthetic standards, but they are necessary.

Third: If a plan was adopted by the Municipal authorities which would define a rock area and permit excavation within that area, utilizing the entire area from border to border, and excavating on a gradual slope and dug to a uniform level, many highly desirable uses of the property might be made. Instead of having one excavation here and an excavation there, within a rock-bearing strata, one big excavation would ultimately result. Such excavation might be used for any of the following purposes:

1. A park with all types of amusement facilities.
2. A highly desirable site for an athletic stadium.
3. An industrial site.

The unsettled conditions of the world today indicate that such a site might be highly useful in the event of an atomic war.

Pending the ultimate development of such an area, the following steps could be taken in order to lessen the aesthetic objections which exist in the minds of some.

A uniform slope with minimum set-backs to existing streets and highways could be established. As the [295] excavation proceeds in accordance with the previous plan, the excavated area could be

fenced, and vegetation of a type which could be sustained in the area, planted along that fence for the purpose of screening the mechanical operations necessary for the rock business from casual observation.

Property values will not necessarily diminish by the excavation of a gravel pit. I cite as example the current housing project known as Laurel Canyon Village. This veterans' housing project is built immediately adjacent to a gravel pit, and adjacent to Fernangeles Park. These houses built on 700 square feet are priced a \$8600.00, \$9100.00, on \$1500.00 lots.

I submit that there is no one single excavation in Los Angeles County that has reverted to the State of California as a result of delinquent taxes.

It is my conclusion that the objections of the people to the operation of the rock industry are not real, but imaginary. I know of no reason why planning, looking to the future, taking into account screen fencing and screen planning, would not remove these objections, whether they be real or imaginary.

What Use Will Be Made of The Property?

The applicant will not construct a permanent plant on the property involved in the application. All that will be done is to extend a conveyor belt from the present plant to the point of excavation. At this point a shovel, electrically powered would

be used. If the character of the material requires, a primary, crusher will be installed. The material excavated would be processed at the present plant.

No noise would be created, no dust or no trucking would be involved. All that we would do from this property would be to excavate, and transport. No processing and no stock piles are involved; except for the excavation, no change will be evident.

This character of operation will not invade any legal right of any person.

Respectfully submitted,

/s/ CLYDE P. HARRELL, JR.,

Attorney for John D. Gregg.

Exhibit A is the Same as Exhibit A to the affidavit of John D. Gregg appearing at page 90 of the certified transcript so is not repeated at this point. [297]

MAP SHOWING LOCATION OF
SAND & GRAVEL DEPOSITS
IN SAN FERNANDO VALLEY

LIT. PLANNING COMM. 43-14
LOS ANGELES - CALIFORNIA
CHAS. S. BEAN ARCHT. F. 34
SCALE 1" = 1000' 24 1/2" = 10 1/2 MI.

LEGEND






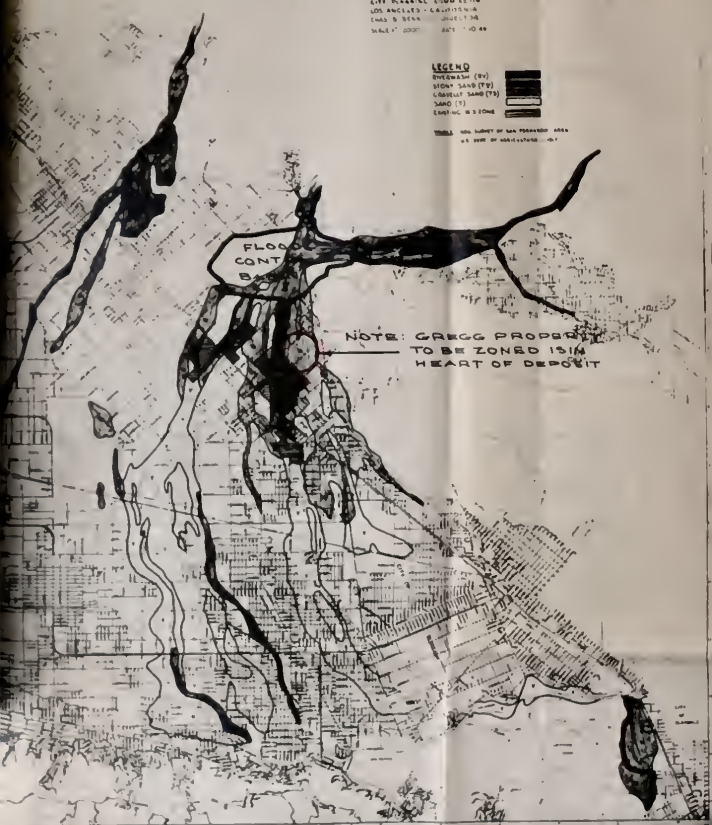
- OVERWASH (OV) 
- STONY SAND (TS) 
- CORRECT SAND (CS) 
- SAND (S) 
- EXISTING U.S. ZONE 

TABLE FOR ZONING OF SAN FERNANDO AREA
AS PER THE ORDINANCE 107



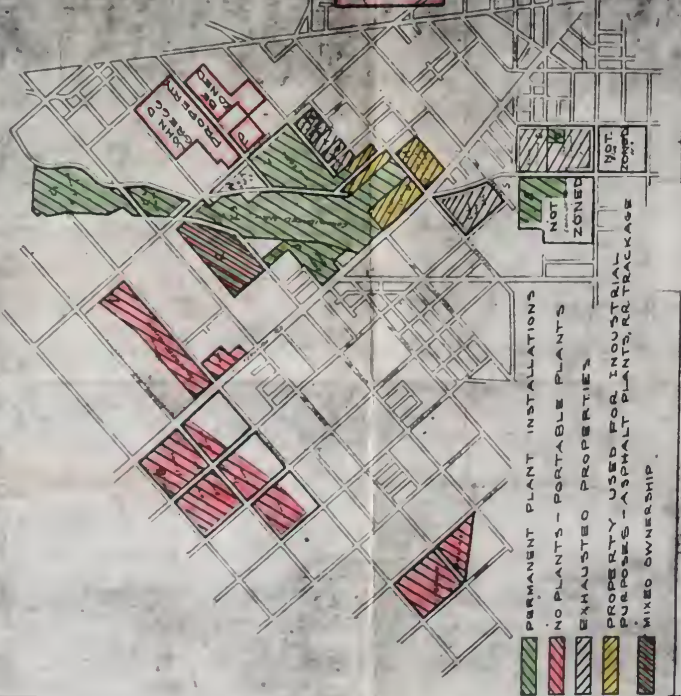
NOTE: GREGG PROPERTY
TO BE ZONED IS IN
HEART OF DEPOSIT

Block	Area (sq. ft.)	Volume (cu. ft.)	Notes
100	100	100	
101	100	100	
102	100	100	
103	100	100	
104	100	100	
105	100	100	
106	100	100	
107	100	100	
108	100	100	
109	100	100	
110	100	100	
111	100	100	
112	100	100	
113	100	100	
114	100	100	
115	100	100	
116	100	100	
117	100	100	
118	100	100	
119	100	100	
120	100	100	
121	100	100	
122	100	100	
123	100	100	
124	100	100	
125	100	100	
126	100	100	
127	100	100	
128	100	100	
129	100	100	
130	100	100	
131	100	100	
132	100	100	
133	100	100	
134	100	100	
135	100	100	
136	100	100	
137	100	100	
138	100	100	
139	100	100	
140	100	100	
141	100	100	
142	100	100	
143	100	100	
144	100	100	
145	100	100	
146	100	100	
147	100	100	
148	100	100	
149	100	100	
150	100	100	

After the removal of existing plants, and within areas used for streets and sidewalks, in temporary emergency, permits for installation of plants should be made for "temporary" plants and for "permanent" plants. The installation of plants should be made for "permanent" plants and for "temporary" plants. The installation of plants should be made for "permanent" plants and for "temporary" plants.

AFTER DEDUCTIONS FOR SLOPE AND PLANT LOSS 310.6 NET PLANT LOSS \$2,120,000 TONS LEAD

MAP SHOWING
 BOX & GRAVEL HOLDINGS
 SIX FERNANDO VALLEY
 DEPARTMENT OF CITY PLAN &
 CITY OF LOS ANGELES
 1948

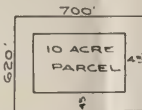
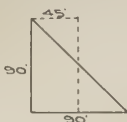


- PERMANENT PLANT INSTALLATIONS
- NO PLANTS - PORTABLE PLANTS
- EXHAUSTED PROPERTIES
- PROPERTY USED FOR INDUSTRIAL PURPOSES - ASPHALT PLANTS, REFRIGERATION
- MIXED OWNERSHIP

EXHIBIT 'C'

COMPUTED AVAILABLE TONNAGE ON 451 ZONED ACRES PER DEPT. CITY PLANNING MAP EXHIBIT "C"

1. DEDUCTIONS must be made for slope loss to prevent slides and cave-ins. 10%
2. DEDUCTIONS must be made for Plant, Stockpiles and Shops 5%
Total 15%
3. For purpose of computing tonnage a 15% deduction has been taken from "Cross Acreage".
4. ACTUAL LOSS, illustrated below shows this 15% deduction to be extremely conservative.



$$\begin{aligned} 620' \times 90' &= 55,800 \text{ SQ FT} \\ 610' \times 90' &= 54,900 \text{ SQ FT} \\ \hline 110,700 \text{ SQ FT} &= 25 \text{ AC. OR } 25\% \end{aligned}$$

5. PARCEL	NET ACRES	MINEABLE ACRES AFTER 15% DEDUCTION		Industrial Property Asphalt & Railroad Trackage
		Permanent Plants	No Plants Portable Plants	
A	20	--	17	--
B	--	--	--	--
*E	*29	19.5	--	--
G	95	--	77.0	--
K-1	40	--	--	--
K-2	11	71.8	--	--
K-3	40	--	--	--
I	45	--	34.5	--
M	19	--	--	16.2
N	6	5	--	--
D	--	--	--	--
B	45	--	36	--
**C	**13	--	--	--
J	12	8	--	--
O	5	5	--	--
L	20	5	--	6.2
F	--	--	--	--
P	--	--	--	--
Q	--	--	--	--
***R	38	***30	--	--
***S	3	*** 1.8	--	--
T	--	--	--	--
U	10	--	--	7
TOTAL	451.0	146.1	164.5	30.0
IN TONS EQUALS		29,220,000	32,900,000	6,000,000

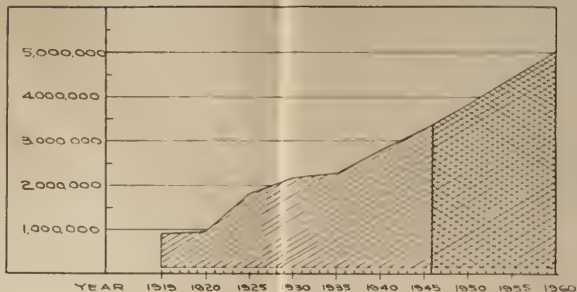
OF THE 340.6 ACRES ONLY 310.6 ACRES ARE MINEABLE
TRANSLATED INTO TONS OF MATERIAL THIS IS:

Permanent Plants Have	23,000,000 Tons
Mixed Ownership Properties Have	6,220,000 Tons
Reserve Properties Have	32,900,000 Tons
	<u>62,120,000 Tons</u>
Industrial Areas Have	6,000,000 Tons
	<u>68,120,000 Tons</u>

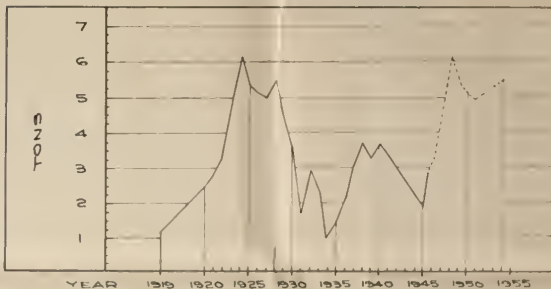
- * Error shows 6 acres more in "Net Acres" than in Gross Acres. This has been added to the 15% deduction to correct.
- ** 13 Acres as shown in "Net Acres" is the Plant Site for this exhausted parcel. Plant is being used to process material from parcel E.
- *** Mixed Ownership Properties.

MARKET DEMAND ROCK AND SAND

POPULATION L.A. COUNTY



TONS PER CAPITA



Average population	1920 - 1929	1,500,000
Average Tonnage produced	1920 to 1929	7,711, 88 tons per year
Consumption per capita	1920 - 1929	5.14 tons per year

Los Angeles population today is more than twice that of the 1920-1929 period, and by 1960, shall be 2 3/4 times the population of the 1920-1929 period, or nearly 4,250,000 people. Using the same consumption as in the previous 10-year period, the annual tonnage of rock and sand required for a population of 8,500,000 or 9,000,000 people in the San Fernando Valley.

EXHIBIT D-1

TONNAGE AND POPULATION DATA

1917 to 1941 Taken from Report of Guy R. Varnum, Examiner
April 10, 1942

Year	L. A. County Population	Industry Sales	Per Capita Consumption in Tons
1917.....	875,000	1,430,939	1.65
1918.....	884,500	1,293,257	1.46
1919.....	910,477	1,132,096	1.24
1920.....	936,455	2,312,167	2.47
1921.....	1,086,408	3,000,000	2.76
1922.....	1,255,353	4,065,393	3.24
1923.....	1,378,685	7,032,608	5.10
1924.....	1,509,318	9,216,720	6.13
1925.....	1,864,733	10,000,000	5.37
1926.....	1,933,675	10,000,000	5.18
1927.....	1,996,507	10,000,000	5.00
1928.....	2,074,812	11,500,000	5.54
1929.....	2,196,195	10,000,000	4.56
1930.....	2,199,557	8,000,000	3.64
1931.....	2,240,208	4,000,000	1.78
1932.....	2,290,212	6,827,750	2.97
1933.....	2,280,234	5,366,341	2.35
1934.....	2,307,104	2,300,881	1.00
1935.....	2,309,372	2,850,300	1.40
1936.....	2,321,634	6,053,313	2.61
1937.....	2,366,904	7,358,924	3.06
1938.....	2,368,242	8,810,337	3.72
1939.....	2,500,000	8,288,186	3.32
1940.....	2,785,645	8,858,883	3.17
1941.....	2,860,000	9,815,796	
1942.....	2,942,000	Not available	Not available

Year	Population L. A. County	Sales Industry	in Tons Per Capita Consumption
1943.....	3,100,000	Not available	Not available
1944.....	3,225,000	Not available	Not available
1945.....	3,320,000	5,739,000	1.7
1946.....	3,420,000	10,000,000	2.80
1947.....	3,520,000		
1948.....	3,620,000		
1949.....	3,720,000		
1950.....	3,830,000		
1951.....	3,940,000		
1952.....	4,050,000		
1953.....	4,160,000		
1954.....	4,270,000		
1955.....	4,380,000		

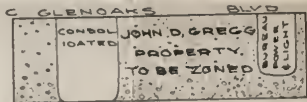
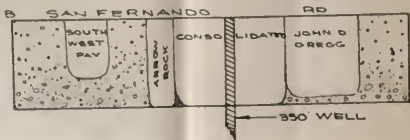
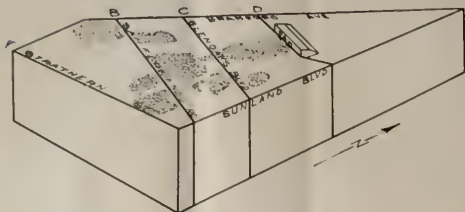
Note: Industry tonnages for years 1917-1936 both inclusive, excepting 1921 were taken from Lange Report; year 1921 estimated by the writer; years 1937 and 1938 were Lange Report figures plus 3.5 per cent; years 1939, 1940 and 1941 were estimates of Concrete Aggregates and Varnum for L. A. County, plus Consolidated Rock Products Company sales outside of county.

Industry tonnages for years 1942-1944 not available.

1946 Annual projection is on basis of July tonnage.

L. A. County population figures are from United States census for census years, and Chamber of Commerce interim estimates. Population estimates for 1946 to 1955 L. A. Planning Commission Estimates.

ROCK DEPOSIT SAN FERNANDO





- 526,880 TONS OR 6 MONTHS RESERVE REMAIN TO BE MINED BECAUSE
- 1 PRODUCTION CANNOT BE MAINTAINED OR INCREASED IF STOCKPILE AND PLANT ARE ELIMINATED HENCE PARCELS C & D CANNOT BE CONSIDERED AS RESERVE
- 2 INCREASED PRODUCTION NECESSITATED EVEN A LARGER STOCK PILE AREA
- 3 WATER RECOVERY FROM PARCELS A & B IS INADVISABLE DUE TO THE NARROW SHAPE AS INDICATED BY "CROSS SECTION EXHIBIT 'F'"

EXHIBIT "B"

File No. 24473

To the Honorable Council
of the City of Los Angeles.

Your Planning Committee begs to report as follows:

In the matter of communication from the City Planning Commission relative to appeal of John D. Gregg from the decision of said Commission in denying his application for conditional use for the excavation of rock, sand, and gravel on real property in the San Fernando Valley bounded generally by Wicks Street, Dronfield Avenue and its southerly extension, Pendleton Street and Glenoaks Boulevard, more particularly described in said application, as amended, of said communicant to the said Commission and known as City Plan Case No. 962.

In accordance with provisions of the zoning ordinance, your Committee conducted a public hearing on this matter whereat proponents and opponents of the question were heard and although a considerable number of protests were filed, after careful consideration of all facts presented and a study of same, it is our opinion that the said use should be permitted.

We therefore Recommend in accordance with the requirements of the zoning ordinance that the Council make the following written findings of fact:

The Council finds that the findings of the City Planning Commission on which said Commission's

decision was based denying this application were in error for the following reasons:

1. That the property involved is situated in a district, the character of which is unsuited for residential purposes.

2. That the land in question is composed of gravel beds and is primarily suitable only for production of sand, rock and gravel.

(Stamped) October 2 - 1946

3. That the proposed use of this property is deemed essential to the public convenience and welfare and is in harmony with the various elements or objectives of the master plan.

4. That under the conditions to be imposed the proposed use would not be detrimental to surrounding developments and would not adversely affect individual property rights or interfere with the enjoyment of property rights of property owners in the vicinity or affect any legal right of such property owners.

Your Planning Committee begs to report as follows:

5. While there are about 450 acres of rock bearing land in M-3 zones in the area only 23,000,000 tons are available to existing plant facilities and this amount is not sufficient to meet public and private demand for rock aggregates.

We further find from the foregoing reasons that the public necessity, convenience, and general welfare require that this appeal be granted and the conditional use be permitted as requested subject to the following conditions:

1. That the applicant construct a 6-foot cyclone type mesh wire fence around the said property, in-

cluding barbed wire on the top of said fence providing the Fire Department grants permission for same.

2. That no permanent plant building or structure be installed or maintained on said property and that all material excavated be mined by an electrically powered shovel and primary crusher and transported by a conveyor belt system running through a tunnel or tunnels under Glenoaks Boulevard to the plant now owned and operated by applicant, lying southwesterly of said Boulevard and processed at said plant.

3. That a setback line of fifty feet from all property lines and existing streets be maintained and that slopes of excavations be maintained at one foot to one foot.

4. That the area between all property lines or street line and 50 foot setback be screen planted progressively as excavations proceed.

We Further Recommend that permission be granted to said applicant to make such excavations in Glenoaks Boulevard as may be necessary to install and house the necessary conveyor belts, such excavations to be made in accordance with specifications of and at the location approved by the Board of Public Works.

Respectfully submitted,

PLANNING COMMITTEE.

(Signed By) C. C. RASMUSSEN,
HAROLD A. HENRY,
J. WIN AUSTIN,

JFS/md

9/27/46 [307]

Received copy of the within Affidavit of Harold A. Henry and J. Win Austin on Behalf of Defendant City of Los Angeles in Opposition to Preliminary Injunction this 1st day of December, 1947.

OLIVER O. CLARK,

By /s/ M. BAILUS,

Attorney for Plaintiffs.

[Endorsed]: Filed Dec. 1, 1947. [308]

In the United States District Court, Southern
District of California, Central Division

No. 7765—P. H.

HENRY WALLACE WINCHESTER, et al.,
Plaintiffs,

vs.

J. D. GREGG, and the CITY OF LOS ANGELES,
a municipal corporation,

Defendants.

AFFIDAVIT OF LOUISE TAYLOR IN SUP-
PORT OF PENDING APPLICATION FOR
PRELIMINARY INJUNCTION

State of California,
County of Los Angeles—ss.

Louise Taylor, being first duly sworn, deposes and says:

That she resides between the critical area described in plaintiffs' complaint herein and Wicks

Street described in said complaint and between said critical area and Glenoaks Boulevard as described in said complaint and has continuously resided at that place for more than two years last past; that she is familiar with operations which the defendant John D. Gregg has conducted at the northwesterly corner of Peoria Street and Glenoaks Boulevard since the grant to him of a variance permit on October 2, 1946, as set forth in the complaint herein, and that throughout the conduct of said operations large quantities of dust and dirt have arisen from said operations and have been transported therefrom to the said home of affiant and that the [309] same, together with the noise of said operations throughout the conduct thereof was most offensive and detrimental and very substantially interfered with the comfortable enjoyment of the home of affiant by herself and the members of her family.

Dated: December 3, 1947.

/s/ LOUISE TAYLOR.

Subscribed and sworn to before me this 3rd day of December, 1947.

/s/ DAVID D. LALLEE,

Notary Public in and for said
County and State.

[Endorsed]: Filed Dec. 4, 1947.

[Title of District Court and Cause.]

AFFIDAVIT OF H. B. LYNCH IN SUPPORT
OF MOTION FOR PRELIMINARY IN-
JUNCTION.

State of California,
County of Los Angeles—ss.

H. B. Lynch, being first duly sworn, deposes and says:

That he is, and for more than 35 years continuously last past, has been a Civil Engineer engaged continuously in the practice of his profession in the State of California and that he is, and ever since the enactment of the California law for the registration of civil engineers in this state, has been registered as a Civil Engineer in the State of California.

That he is personally familiar with the land referred to as the "Critical Area" in the complaint on file herein and as to which the defendant John D. Gregg has been granted a permit by the City Council of the defendant City to excavate thereon for the production of rock, sand, and gravel; that affiant is familiar, also, with and [311] has personally examined all of the lands in the San Fernando Valley upon which such operations heretofore have been conducted; that the character and composition of the lands covered by said permit are such that in event a pit is excavated to a depth of one hundred feet or thereabouts on a slope of one vertical foot to each horizontal foot it is a practical certainty

that by reason of the natural processes of erosion the angle of said pit within a period of about twenty years will be substantially one and one-half feet horizontally for each vertical foot and that thereafter said angle will be flattened by natural processes to an angle substantially flatter than that hereinbefore stated; that by reason thereof it is a practical certainty that the excavation of such a pit which at surface is distant only fifty feet from a public highway, or adjoining property, will recede at surface until the edge of said pit will be substantially at the property line of said property.

Affiant further states that in addition to the foregoing the action upon such a pit, if dug upon said property, of surface waters which accumulate in that area periodically during periods of storm will cut deep gashes several hundred feet in length and from three to twenty-five or thirty feet in depth extending from the margin of said pit outwardly into and upon the properties adjacent thereto.

That upon the trial in the State Court of the action referred to in the affidavit of the defendant John D. Gregg on file herein before Honorable Alfred L. Bartlett, said defendant Gregg produced for and on his behalf a civil engineer named Raymond Hill who testified to the necessity of protecting any such pit dug upon said property against the influence of such accumulations of surface waters by the construction of a very substantial dike upon the margin of said pit and completely surrounding said pit, and that in the opinion of affiant the construction of such a dike would cost a minimum of \$50,000.00. [312]

That since the first of this year a new rock, sand and gravel processing plant has been completed in the San Fernando Valley by Granite Materials Company and is now in operation for the commercial production of rock aggregates and the sale thereof to the trade and that the capacity of said plant is substantially equal to the capacity of the plant of said defendant John D. Gregg wherein he proposes to process materials from said "Critical Area."

That in August and September of 1946, before the Granite Materials plant become productive, said John D. Gregg shut down his plant for two months; that during that period no emergency arose in the rock business which could not be supplied by the plants remaining in operation.

That Exhibit "A-3" attached to the affidavit of John D. Gregg is a map purporting to show rock and gravel available to Gregg's plant; that said map shows only a portion of the property and omits entirely that portion of the property wherein is situated the greatest amount of available rock, sand and gravel.

Dated: December 4, 1947.

/s/ H. B. LYNCH.

Subscribed and sworn to before me this 4th day of December, 1947.

/s/ DAVID D. LALLEE,

Notary Public in and for
said County and State.

[Endorsed]: Filed Dec. 4, 1947. [313]

[Title of District Court and Cause.]

AFFIDAVIT OF ALBERT M. SCHEBLE IN
SUPPORT OF PENDING APPLICATION
FOR PRELIMINARY INJUNCTION

State of California,
County of Los Angeles—ss.

Albert M. Scheble, being first duly sworn, deposes and says:

That he is a licensed realtor under the laws of the State of California, and is and for several years immediately last past has been actively engaged in the conduct of a general real estate business in the San Fernando Valley in the City of Los Angeles, County of Los Angeles, State of California.

That he is personally familiar with the real property hereinafter described and has been familiar with said property for several years last past; that said real property is most excellently adapted to residential development and use and is, for more than one year continuously last past, has been of a reasonable market value of not less than \$2500.00 per acre exclusively for residential development [314] and use, and that there was for a period of more than two years immediately preceding October 2, 1946, a substantial demand in the market for said real property for residential development and use, and that in the opinion of the affiant if the variance permit granted to John D. Gregg of October 2, 1946, is nullified there will be an immediate and substantial demand in the market for said land for residen-

tial use and development. That the conduct of operations for the production of rock, sand, and gravel upon said land under said variance permit will very substantially depreciate the market value and the actual value of the lands surrounding said property and situated within said community area and of the homes and improvements thereon.

Said real property is situated in the City of Los Angeles, County of Los Angeles, State of California, and is known and described as follows, to wit:

Lots 1, 2, 4, 5, 6, 7, 13 and 14 in Block 19; the Easterly 150 feet of Lot 12 in Block 18; Lots 4 to 9 inclusive, and Lots 15 to 19 inclusive, and Lots 21 and 22 and the Westerly 280 feet of Lot 14 in Block 17 of the Los Angeles Land and Water Company's Subdivision of a part of the Maclay Rancho, as per map recorded in Book 3 of Maps, Pages 17 and 18, in the Office of the County Recorder of Los Angeles County, California.

Dated: December 3, 1947.

/s/ ALBERT M. SCHEBLE

Subscribed and sworn to before me this 3rd day of December, 1947.

[Seal] DAVID D. LALLEE,
Notary Public in and for said County and State.

[Endorsed]: Filed Dec. 4, 1947. [315]

[Title of District Court and Cause.]

AFFIDAVIT OF R. L. FARLEY IN SUPPORT
OF PENDING APPLICATION FOR PRE-
LIMINARY INJUNCTION

State of California,
County of Los Angeles—ss.

R. L. Farley, being first duly sworn deposes and says:

That he is a licensed realtor under the laws of the State of California, and is and for several years immediately last past has been actively engaged in the conduct of a general real estate business in the San Fernando Valley in the City of Los Angeles, County of Los Angeles, State of California.

That he is personally familiar with the real property hereinafter described and has been familiar with said property for several years last past; that said real property is most excellently adapted to residential development and use and is, and for more than one year continuously last past, has been of a reasonable market value of not less than \$2500.00 per acre exclusively for residential development [316] and use, and that there was for a period of more than two years immediately preceding October 2, 1946, a substantial demand in the market for said real property for residential development and use, and that in the opinion of the affiant if the variance permit granted to John D. Gregg of October 2, 1946, is nullified there will be an immediate and substantial demand in the market for said land for residen-

tial use and development. That the conduct of operations for the production of rock, sand, and gravel upon said land under said variance permit will very substantially depreciate the market value and the actual value of the lands surrounding said property and situated within said community area and of the homes and improvements thereon.

Said real property is situated in the City of Los Angeles, County of Los Angeles, State of California, and is known and described as follows, to wit:

Lots 1, 2, 4, 5, 6, 7, 13 and 14 in Block 19; the Easterly 150 feet of Lot 12 in Block 18; Lots 4 to 9 inclusive, and Lots 15 to 19 inclusive, and Lots 21 and 22 and the Westerly 280 feet of Lot 14 in Block 17 of the Los Angeles Land and Water Company's Subdivision of a part of the Maclay Rancho, as per map recorded in Book 3 of Maps, Pages 17 and 18, in the Office of the County Recorder of Los Angeles County, California.

Dated: December 3, 1947.

/s/ R. L. FARLEY

Subscribed and sworn to before me this 3rd day of December, 1947.

[Seal] MURRAY LEYTON,
Notary Public in and for said County and State.
My commission expires Jan. 29, 1950.

[Endorsed]: Filed Dec. 4, 1947. [317]

[Title of District Court and Cause.]

AFFIDAVIT OF JEANNE MOORE IN SUP-
PORT OF PENDING APPLICATION FOR
PRELIMINARY INJUNCTION

State of California,
County of Los Angeles—ss.

Jeanne Moore, being first duly sworn, deposes and says:

That she resides between the critical area described in plaintiffs' complaint herein and Wicks Street described in said complaint and between said critical area and Glenoaks Boulevard as described in said complaint and has continuously resided at that place for more than two years last past; that she is familiar with operations which the defendant John D. Gregg has conducted at the northwesterly corner of Peoria Street and Glenoaks Boulevard since the grant to him of a variance permit on October 2, 1946, as set forth in the complaint herein, and that throughout the conduct of said operations large quantities of dust and dirt have arisen from said operations and have been transported therefrom to the said home of affiant and that the [318] same together with the noise of said operations throughout the conduct thereof was most offensive and detrimental and very substantially interfered with the comfortable enjoyment of the home of

affiant by herself and the members of her family.

Dated: December 3, 1947.

/s/ JEANNE MOORE

Subscribed and sworn to before me this 3rd day of December, 1947.

[Seal] MURRAY LEYTON

Notary Public in and for said County and State.

My Commission Expires Jan. 29, 1950.

[Endorsed]: Filed Dec. 4, 1947. [319]

In the United States District Court, Southern
District of California, Central Division

No. 7765-P.H.

HENRY WALLACE WINCHESTER, et al.,
Plaintiffs,

vs.

J. D. GREGG, and the CITY OF LOS ANGELES,
a municipal corporation,

Defendants.

REPORTER'S TRANSCRIPT OF EVIDENCE
AND PROCEEDINGS ON HEARING RE
PRELIMINARY INJUNCTION AND MO-
TION TO DISSOLVE THE SAME

The following constitutes a full and complete copy of the transcript of the proceedings in this matter before the above entitled court, exclusive of argument of counsel, offers of exhibits which were subsequently in evidence, and colloquy of

counsel. (Appropriate proceedings will be had to send up the original exhibits.)

The hearing commenced on December 8, 1947, and continued on December 12 and 16, 1947.

The Court: We will proceed with the hearing. If we finish it today, all right, if we do not finish it today we shall, at the conclusion of the day, make some determination about when and how we shall proceed further.

The parties have affidavits and briefs, [320] memoranda, responses and counter-affidavits and the like. I have read the affidavits—I will not say I have read all the briefs—but I have examined the points and many of the cases cited by the parties in connection with their different points on file, both the plaintiffs and the defendants.

I would like to say for the purpose of the record that last Thursday or Friday—I think it was last Thursday—I went out by myself and looked at the property. In order that you may have some idea where I went, I will give you my route.

I went out Glenoaks Boulevard to Pendleton Street and went south as far as I could go and turned around and went back up to Pendleton Street and went north as far as I could go until the street was blocked and turned around and went back. I went on Glenoaks again over to Peoria down Tujunga and around and back up Peoria to what appears to be Clybourn Avenue, then on over by the school—I do not know the name of the street that goes west there—and over down Sheldon Street clear to San Fernando Road; back again, back down

Glenoaks, up Wicks Street, back up to the property and up a street I think they call Art Street, up around to Sunland Boulevard and back again over the property. Then I went up Stonehurst to the foot of Hansen Dam and took another street and got lost and bought a canary.

So I am ready to proceed. (Rep. Tr. p. 9, l. 6 to p. 10, l. 9.)

At the conclusion of the proceedings on December 8, 1947, which consisted largely of argument, the following occurred:

The Court: Excuse me just a moment, Mr. Crump. Mr. Westover telephoned me and said that he had an *ex parte* matter that he might want to interrupt me on.

(Short interruption for other court matters.)

Mr. Crump: What does your Honor desire us to do with respect to the matter under the circumstances?

The Court: I think that Mr. Clark is [321] entitled to represent his client before the Circuit Court of Appeals. They do not pay very much attention to us lower courts in this matter of fixing their calendars. They have fixed his matter for tomorrow morning, and in San Francisco, so I do not think that I can hold him here. If we do not finish this evening I will have to put the matter over until I can hear it and he can be here.

I have a case set for trial tomorrow morning. I haven't heard that it is not going ahead. Usually I get some indictment if it is not.

Let me see the calendar, Mr. Clerk. It is set for three days. It probably would not take any longer than that. So I could resume the hearing on this matter Friday, and I would do so, even if I had not concluded this other case.

Mr. Crump: You will resume this when, did you say?

The Court: Friday. Tuesday, Wednesday and Thursday I allowed time to try this other case.

Mr. Crump: Your Honor please, this puts us in an awkward position. I am very much afraid that under Rule 65 there will be no liability on the bond after today. I realize your Honor has made an order that you will continue the restraining order in effect.

The Court: It will be in the same condition, of course. The restraining order is continued in force on the same conditions as heretofore.

Mr. Crump: But I don't think under the rule that your Honor has any authority—I am not objecting to what your Honor has done, if he had the authority it would be all right with me, but I am just afraid under the rule there is no authority to extend the restraining order beyond the present time and that therefore the bond would be in no effect.

The Court: If there would be no power to extend the restraining order, then I would have to go to the other alternative in order to preserve the status quo until I can decide this question and issue an injunction until further order of the Court. [322]

Mr. Crump: Even that I don't presume your Honor would do without any bond.

The Court: I will not issue any injunction without any bond.

I do not seem to find my Rules of Civil Procedure here.

Are you agreed, Mr. Clark, that Mr. Crump has stated the rule of law concerning supersedeas?

Mr. Clark: Definitely not.

The Court: You do not agree that he has?

Mr. Clark: Oh, no. The Supreme Court has reluctantly expressed its regret in cases that it couldn't do it, but it says it has no jurisdiction under the Constitution, and it begins way back in 15 Cal. I will just read to your Honor briefly—

Mr. Crump: Just a moment, Mr. Clark. I was discussing another problem, unless your Honor wants this stated at this time.

The Court: I am concerned about the power of the Supreme Court of the State of California, or the opportunity of the court which now has jurisdiction of another suit concerning the same subject matter here, to exercise its discretion on the matter of granting a stay until the matter can finally be decided.

Mr. Crump: Since this matter has to go over, wouldn't it be better to hold that whole argument over until we reconvene when both sides will be prepared to present it?

The Court: What makes you think that I have no power to continue this in force?

Mr. Crump: The provisions of Rule 65(b).

The Court: You mean that portion reading: ‘* * * and shall expire by its term within such time after entry, not to exceed 10 days, as the Court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period * * *’?

Mr. Crump: That would fix the power of the Court only for 20 days unless we consent, and we have consented only to the extension [323] up to the present time.

The Court: Certainly I do not think that the rule contemplated that the Court would be denied the power to pass on questions merely by exhaustion.

Mr. Crump: Oh, no, I don't think the Court is, and I certainly have no desire to interfere with the orderly processes of justice, but your Honor will recall that I took the position when we were up here before that this bond was inadequate, and I still think it is inadequate, and if it is going to be held up any great length of time longer I think the bond should be increased.

Without waiving our position at all, I suggest that the argument be put over until Friday.

The Court: There is sufficient showing before me that I can make another injunction until the further order of the Court, not under this temporary restraining order but an injunction pendente lite until the further order of the Court.

Mr. Crump: I don't question that, your Honor.

The Court: If there is any question about the power of the Court to continue this restraining order in force until Friday, until the matter can

be heard, why I shall direct the issuance of such an injunction, conditioned upon the same conditions as heretofore.

Mr. Crump: Let me state to your Honor that I am making this statement because I want to preserve all the rights we have under this bond. We are not consenting to any further continuance of the restraining order. However, if your Honor makes the order that you are going to continue it until the argument is concluded, we are not going to violate it.

The Court: You expressed a possibility that the provisions of the bond would be invalid if it were carried forward.

Mr. Crump: I will have to take chances on that.

The Court: It is not my intention that a restraining order should be put in force here without some bond. [324]

Mr. Crump: That is my position, your Honor.

The Court: And in view of your suggestion of that possibility I think you should be protected by a bond at all times. If that is the case I will now make an order continuing the hearing of your motion to dismiss—I will deny your motion to dissolve the temporary restraining order, I will grant the motion for an injunction until further order of the Court, conditioned upon the same conditions as that heretofore indicated, not only in the terms of the written injunction but as well in the terms of the oral statement which I made the last time the matter was up here, to wit, that the injunction would not be effective south of Glenoaks Boulevard unless and until an additional bond of \$10,000 was deposited.

Mr. Crump: Then I take it that a bond will have to be put on the preliminary injunction that your Honor is now granting?

The Court: That is correct. A bond will have to be deposited. A new bond will have to be deposited and the injunction will have to be drawn. I will continue all of your motions in connection with the matter and I will also deem your motion to dissolve the temporary restraining order as having been made as a motion to dissolve the temporary injunction.

Mr. Clark: We stipulate to that. (Rep. Tr. p. 151, line 14 to p. 156, line 25)

The Court: We are here discussing the motion to dismiss and the motion for a temporary restraining order and your motion to strike.

Mr. Crump: And the motion of plaintiffs for a preliminary injunction.

The Court: Yes. Well, the motion of plaintiffs for a preliminary injunction, which now takes the color and complexion of a motion to dissolve the present injunction, but it is being [325] heard as if it were a motion for a preliminary injunction.

Now, in the course of your statement this morning you said that if the action was not dismissed this Court had the power to stay it. Am I to understand that you are moving for a stay in the alternative?

Mr. Crump: I am not moving for a stay in the alternative.

The Court: Very well.

Mr. Crump: Just a moment, if the Court please—it is my opinion that the greater includes

the lesser, and that without a formal motion to stay, if this Court concluded that it should not dismiss, it would have the power to stay and, in fact under the authorities, as I see it, it would be the duty of the Court to do so. I believe the Court could do that *sua sponte* without any formal motion to that effect.

Now I would like to pass to the next matter.

The Court: Excuse me again. Before we conclude I would like to have Mr. Gregg called to the stand as I want to ask him a few questions.

Mr. Crump: Yes, your Honor.

Now I want to discuss this proposition, the expediency of the granting of the permit to Mr. Gregg is a question for the Council and is not subject to judicial review.

(Rep. Tr. p. 224, line 19, to p. 225, line 25.)

JOHN D. GREGG

called as a witness, was examined and testified as follows:

The Court: Mr. Gregg, it appeared from some of the affidavits that on some of the parcels of land included within your exception to the zoning ordinance there was a previous excavation by the Bureau of Power and Light. I have forgotten the particular parcel of property it is on by legal description. Do you know the depth [326] of that?

The Witness: Well, that was not within this permit area but across Pendleton.

The Court: It is immediately adjacent?

(Testimony of John D. Gregg.)

The Witness: It is immediately adjacent, and I can approximate it. I would say that the deepest portion of the excavation is probably around 50 to 60 feet.

The Court: Fifty to 60 feet?

The Witness: Yes.

The Court: How deep is your excavation south of Glenoaks?

The Witness: We average about 100 feet.

The Court: Why don't you go deeper?

The Witness: The material is too soft.

The Court: The material?

The Witness: The rock becomes soft and it will not meet the specifications. There is a very clean line of demarcation between the softer materials.

The Court: In other words, the fill is the first 100 feet, that is the gravel bed, is the first 100 feet?

The Witness: The gravel goes on down but it becomes decomposed at that point.

The Court: I see. So that the maximum depth of the deposit is approximately a hundred feet over the whole wash?

The Witness: That is correct.

The Court: Now in the event that there had been no legal proceedings, what had been your plan of excavation north of Glenoaks, that is to say, would you excavate each portion a total depth of a hundred feet as you excavated from the surface, or was it your plan to have excavated, say, 25 feet and then take the next 25, and so forth? How do you work that?

(Testimony of John D. Gregg.)

The Witness: There are two reasons for excavating your full depth. [327]

The Court: I am just asking what your plan was.

The Witness: My plan was to go the full depth, for which there is a very good reason.

The Court: As you progress?

The Witness: That is right.

The Court: Well, now, at your little elevator plant under the boulevard there——

Mr. Crump: Conveyor belt, your Honor.

The Court: ——conveyor, that is only about 25 feet below the surface, isn't it?

The Witness: It is about 12 feet.

The Court: About 12 feet?

The Witness: Yes, sir.

The Court: And your plan comprehended that you should excavate back of that and lift to that?

The Witness: We will go down with that conveyor on a slope of about 3½ inches to the foot until we reach our maximum depth, and then we will carry on to our maximum depth.

The Court: Now, what is your reason for excavating at your maximum depth as you go along?

The Witness: Well, there are two reasons for it. The first reason is the economics of it. You would make one cut and you take your entire product.

The major reason for doing it is the difference in the grading of the material. The material is all placed in there with water, your stratas may be anywhere from an inch or so in thickness, the

(Testimony of John D. Gregg.)

stratas of sand, and the stratas of course rock and boulders, and in some cases you may have some deleterious material, but you get a complete grading of your material from the top of the bank to the bottom.

Now your bottom sands are much coarser than your top sands and you need the finer in the top to mix with your coarse sand [328] on the bottom in order to stay within the specifications.

The Court: How far would your estimate be back from Glenoaks from your excavation within a period of a year?

The Witness: How much will I excavate during that time?

The Court: How many linear feet back north from Glenoaks?

The Witness: In cubic content the excavated area per acre, there is about 268,000 tons. I will excavate approximately a million tons in a year. In other words, approximately four acres in total.

The Court: Per year?

The Witness: Yes. Now, there is in that area north of Glenoaks—

The Court: Do you have another map on a smaller scale showing his property? There was one in the file, or you had one, I believe.

The Witness: There is a smaller picture in the file.

Mr. Dunne: You mean the aerial map we had here?

The Court: Just showing his property to a smaller scale than this map here.

(Testimony of John D. Gregg.)

Mr. Clark: The map first on the board, your Honor, will show it.

The Court: I think probably that is it. Yes, that is it.

Will you step down there, Mr. Gregg?

Your conveyor under the street, that is a requirement of the permit from the City, isn't it?

The Witness: That is correct.

The Court: And that is located where? Point that out.

The Witness: Right here. (indicating)

The Court: What was your plan of excavation, assuming that there had been no interruption by litigation or otherwise?

The Witness: Well, if your Honor will remember, at the time you were out there, if you looked at this, the conveyor comes [329] straight across Glenoaks and there is a junction point about 60 or 70 feet out from the end of the tunnel. At that point we are turning the conveyor. If we continued this we would go out in this line here. (indicating) But we are turning that conveyor and coming down in this direction, going practically parallel to Peoria but at a slight angle away from it, so that at the time, if this point here were too close to have approached our maximum depth, I believe that around 600 feet from Glenoaks we will be down at our maximum depth and at that time we will be at least 200, possibly 250 lineal feet from Peoria. That will continue on out——

The Court: Westerly?

(Testimony of John D. Gregg.)

The Witness: —westerly, slightly westerly—it is almost due north in direction, as a matter of fact, due to the way the streets run—but continue at an angle slightly away from Peoria until such time as the conveyor is——

The Court: In a line with those lots?

The Witness: It will be 350 feet from Peoria. In other words, from this point here we will continue out on that slight angle until we are 350 feet away from Peoria Street, at which time we will then turn and parallel Peoria in order to get our maximum width in our cut.

The Court: How big a space there would four acres take, or a year's operations?

The Witness: These lots here are five acres, between this line here. (Indicating)

The Court: How wide were you going to make your cut?

The Witness: The cut will be, when you arrive at your maximum depth, about 400 feet wide at the toe.

The Court: Then a year's supply would take you with a 400 feet wide strip quite a way up that street? [330]

The Witness: Your original cut when you first start down at 12 feet, there is substantially no tonnage at 12 feet, and you make distance quite rapidly at that shallow cut. I haven't computed the tonnage that we will excavate at the time we arrive at our maximum cut, but once we arrive at the maximum cut we then have somewhere around 268,-

(Testimony of John D. Gregg.)

000 tons per cubic acre excavated, or per square acre excavated at the 100 feet.

The Court: What I am trying to get at is this: What would happen within two years, assuming no restraining order were granted? Where would you be? What would the condition of that land be out there?

The Witness: My maximum excavation at the end of two years will be not to exceed 2 million tons.

Mr. Crump: He wants to know what area you would cover.

The Court: That doesn't mean anything to me, 2 million tons.

The Witness: That would be about eight acres.

The Court: On your present plant, just take a little pencil mark and draw around at the end of two years about what you would have excavated.

Mr. Crump: Mr. Gregg, I think what the judge wants is to have you mark the square area which you would have excavated.

The Court: In other words, at the end of that one year, going along that street there, you would have the easterly half of those two 5-acre lots cut in one year's operations?

The Witness: I beg your pardon?

The Court: In other words, at the end of one year you would have approximately the easterly half of those two 5-acre lots, that is, $2\frac{1}{2}$ acres and $2\frac{1}{2}$ acres?

The Witness: We might exceed that at the end of one year. I was trying to just get a rough approximation of the cut until I get to my maxi-

(Testimony of John D. Gregg.)

imum depth and then I was just sketching it in here as to what the maximum cut likely would be, and I would say—this is an approximation—that it would approximate something more [331] or less like I have diagrammed here.

The Court: With a gradual slope from Glen-oaks on down to the maximum depth there?

The Witness: That is right; 50 foot burrow and a 1 to 1 slope will be maintained on the other sides.

The Court: That Bureau of Power and Light excavation with a maximum depth of only 50 feet, that is pretty gradual I notice from all of the edges. Is there any particular reason for that? I mean, couldn't they get the gradation of the sizes involved in that pit?

The Witness: Your gradations in your first 50 feet are better than they are from there on down. You can operate your top along quite successfully, but after you strip the top off where you run into difficulty is in your lower excavation. You need the blend of that top with the lower.

The Court: You mix the top with the bottom?

The Witness: That is right.

The Court: Suppose that you were restricted in your operations to a maximum depth of 30 feet, what would be the effect? In other words, you could get all of the grade you require within that 30 feet.

The Witness: That is true, but you might likely destroy the usefulness of that material below the 30-foot because your top 30 feet is your hardest

(Testimony of John D. Gregg.)

material, as well as your fine material, and you would most likely put the material outside of the standard specifications.

Now that question I can't—as to the hardness I couldn't tell you exactly what that hardness is until I am excavating—but that has been all our experience, that unless we take out full cut we cannot stay within the specifications.

There is one plant that is operating differently and he has had no end of trouble with that type of operation. [332]

The Court: Have any of those excavations that have been made in the Valley ever been filled?

The Witness: Well, we have refilled quite a portion of our present pit in here; Consolidated have refilled quite a few million tons in this area here.

The Court: What do they refill it with?

The Witness: Well, waste material, some waste from their own plant. I have refilled with dirt and broken concrete, generally waste from excavations.

The Court: Waste from excavations? You mean, for instance, street excavations?

The Witness: Street excavations—there is just no end to the different things. I have been very careful not to put any material in there that would burn or would shrink. I have taken only solid material into my pit, and I know that I must have had from outside sources several million tons in the last 10 or 12 years.

The Court: In the refilling of those excavations, what is the general course of business with relation

(Testimony of John D. Gregg.)

to this point? Do you have to buy the refill or does the person who is digging the place pay you to have a place to dump it?

The Witness: They pay us to have a place to dump it. I have received varying amounts from different contractors depending on whether I wanted it.

Now in one case I actually wanted some of the material and let them in at a very nominal price. Other times the privilege of dumping is more valuable than the original excavation. It is substantially so on the pits in old Alameda Street, the Blue Diamond pit and the Consolidated pit. They are more valuable than they were originally at the time they were excavated.

The Court: That is for dumping purposes?

The Witness: Yes.

Mr. Crump: After they are filled they are more valuable, you mean? [333]

The Witness: They are more valuable as a hole for the purpose of filling.

Mr. Crump: H-o-l-e; I see.

The Court: Alameda Street is valuable because the industrial district has come around there?

The Witness: Yes, but there will shortly be an end to that. The Los Angeles By-Products Company would lease my present pit in a minute if I would lease it to them for the purpose of dumping ashes. After they process their product they get the tin cans and all the metal out and have considerable ashes left, and they are now seeking a

(Testimony of John D. Gregg.)

place, additional property, and Mr. Clarence Gregg—who is no relation of mine—told me that he could see the day not too long distant when we might be hauling debris out to sea by barge the same as they do in New York and dumping it for lack of a place to dump it.

The Court: Do you know of any pit excavated in the Valley which has ever been filled and then had dirt put on top of it?

The Witness: No I do not. I don't believe that any of them as yet have been completely refilled.

Mr. Crump: May I ask a question—pardon me.

The Court: Go ahead.

Mr. Crump: I wanted to ask, right on that point, if there is any reason why it couldn't be refilled and dirt put on top of it.

The Witness: None whatsoever.

Mr. Crump: I then would like to state that we are willing to stipulate that if he excavated pending the outcome of this case, the state court case, either one, that we will refill if the judgment should be against him in the case. We make that offer of stipulation.

Mr. Clark: I couldn't stipulate to that because we know that it is a practical impossibility. Of all the hundreds of acres of pits in Los Angeles County, none has ever been refilled excepting [334] the one down there in the heart of the Alameda district. There are hundreds of acres of unfilled pits in the San Fernando Valley now.

(Testimony of John D. Gregg.)

Mr. Crump: I think the Court can take judicial notice of the physical fact that a pit can be refilled.

Mr. Clark: With what? Mr. Gregg has been using concrete crates from the war period, from the airplane industry, to fill with. You can see them laying there on the banks.

The Court: I was wondering what those things were.

Mr. Clark: That is what they are.

Mr. Crump: We make the offer anyway.

The Court: You make the offer to stipulate?

Mr. Crump: Yes.

The Court: What is your investment in machinery and equipment in place? That is to say, in the pit, excluding mobile equipment such as trucks but not excluding mobile equipment that you use in the pit?

Mr. Crump: That is physical plant and equipment?

The Court: That is the physical plant.

The Witness: You are referring to the plant itself as well as the pit operation?

The Court: I am referring to the plant and the diggers and the shovels and the conveyor.

Mr. Crump: Everything except the trucks.

The Court: The crushers and the bins, the elevators, and so on?

The Witness: I haven't the breakdown exactly in my mind.

The Court: Just roughly.

The Witness: My total investment is somewhere around a million dollars, and the breakdown on

(Testimony of John D. Gregg.)

that, the trucking equipment would run somewhere around \$150,000 to \$200,000.

The Court: The greater portion roughly of your investment in equipment in place is around a million dollars? [335]

The Witness: Including trucks. I could point out to you that this shovel alone here is worth to exceed \$100,000. The conveyor system going across to this point will approximate some \$75,000 or \$80,000. That is new conveyor equipment.

The Court: Under the terms of the permit you were required to keep your crushing and grinding bins south of Glenoaks, are you?

The Witness: I have everything south of Glenoaks with the exception of the shovel and the primary jaw crusher which follows the shovel. I am required to house that. In my present operation it is not housed.

Mr. Crump: That was by a court order?

The Witness: That is right. We agreed to that.

And at the time I move across there I must house that crusher, when I move the crusher over there.

The Court: What I am trying to get at is in the operation of this property, in the excavation of it, is it the requirement of the council exception that you shall keep all of that physical equipment that now exists south of Glenoaks, south of Glenoaks? In other words, do you have to bring all of your rock and everything down there to segregate it?

The Witness: That is correct.

(Testimony of John D. Gregg.)

The Court: You have to bring it all up through that tunnel?

The Witness: That is correct.

The Court: So that the only physical machinery operating north of Glenoaks will be the shovel, the housed crusher and the conveyor?

The Witness: And a dragline to rake the bank. There will be a dragline. That will be the only equipment above the surface of the ground, will be an electric dragline, and in the pit itself will be the shovel, crusher and the conveyor system.

Mr. Crump: And may I ask, you are required to wet down the banks? [336]

The Witness: That is right.

The Court: When you use the dragline?

The Witness: That is right.

Mr. Clark: Your Honor has in mind not by the terms of the permit?

The Court: That is by the terms of the decree.

Mr. Crump: The housing of the primary crusher and the wetting down of the banks are additions made by the decree of the Superior Court, so to that extent they constitute in effect an injunction regulating the operations.

The Court: What I am getting at, it is the present conditions of his operation. In short, if I understand you correctly, under the present conditions you will have no physical plant operating north of Glenoaks Boulevard except the digging equipment.

The Witness: That is correct.

The Court: The digging and conveying equipment.

(Testimony of John D. Gregg.)

Mr. Clark: And the crusher, your Honor.

The Witness: And the primary crusher.

The Court: The primary crusher is a mobile unit?

The Witness: It is on railroad wheels and rails.

The Court: Which follows your digger?

The Witness: Yes, it is movable equipment.

The Court: That is all I have.

Mr. Clark: May I, your Honor, make this suggestion in view of Mr. Crump's suggestion? There is no prohibition in this permit against the maintenance of stockpiles northerly of Glenoaks Boulevard or on the permit area.

Mr. Crump: There is no purpose of having stockpiles up there where it would be uneconomic.

The Court: Let me ask Mr. Gregg another question. Your material is received and put through the primary crusher?

The Witness: Yes, sir. [337]

The Court: Where is it segregated into sand and gravel and rock of the different sizes and brands?

The Witness: After it gets to the plant west or southerly of Glenoaks. There is no place to stop this material in the way we have our plant laid out once it starts moving. It is only a matter of minutes until it crosses Glenoaks Boulevard, at which time it goes into a large surge pile, the tuner for which is in, the steel work, the truss for the conveyor is in, the whole application of equipment

(Testimony of John D. Gregg.)

is there where it can be seen in exactly the way we intend to operate. We do not intend to, and it would not be a practical thing to do, to have a surge pile north of Glenoaks Boulevard.

The Court: A surge pile is what? What do you mean by that?

The Court (The Witness): This material is discharged off the conveyor coming under Glenoaks Boulevard at an elevation about ground level, or slightly above ground level. The tunnel under that stockpile is approximately a hundred feet below that, so that this surge pile it is discharged into will have a varying depth.

The Court: The surge pile is simply the rock after it goes through the primary crusher, is that what you mean?

The Witness: All the material is still together in one big pile.

The Court: In other words, you dig it, put it through the primary crusher, take it in the conveyor, pile it up and then you have another conveyor that takes it to the segregation plant?

The Witness: That is correct. And that is done primarily to segregate the operation so that the digging operation north of Glenoaks has nothing whatsoever to do with the plant itself. The only thing that it does, it replenishes this stockpile.

The Court: I see. I have no other questions.
(Rep. Tr., p. 250, line 24, to p. 267, line 10.) [338]

(Testimony of John D. Gregg.)

Defendant, J. D. Gregg, recalled as a witness in his own behalf, was examined and testified further as follows:

Q. (By Mr. Crump): Now, Mr. Gregg, will you explain the drawing to the Court?

The Court: Have you seen this, Mr. Clark?

Mr. Clark: Yes, I did, your Honor. Counsel showed it to me this morning.

The Witness: This is Glenoaks Boulevard, and at the lower part of the drawing is Peoria Street. Now the tunnel across the intersection is denoted by this line coming through here. This point is the intersection of the conveyors. At the present time the large shovel is in here adjacent about 40 or 50 feet from this intersection point.

Now the tonnage computed from the station 0 plus 48, which is this point here, to station 3 plus 98—and it would be about six feet beyond that—at which point we are 100 feet in depth. The tonnage computed here is 379,500 tons.

At this point we have gone down 3½ inches to the foot. We are a hundred feet in depth. This conveyor goes out of the same angle and we call it Junction A. At Junction A we start paralleling Peoria Street. The tonnage to Junction A is 1,593,000 tons and it is necessary to go 141 feet beyond that point or 2,000,000 tons.

The blue shading indicates the sloping of the bank, that is a 50-foot berm here, the slope of the bank; this is a roadway into the pit itself and the slope of the bank is on this side.

(Testimony of John D. Gregg.)

This drawing was made some time ago for the purposes of getting our exact slope and the slope of the conveyor, the elevation of the conveyor and the slope of the banks.

The Court: Plotting your operations?

The Witness: Plotting the operation. I had my engineers [339] calculate the tonnage so I would know exactly what I was talking about.

The Court: And this blue shaded area—

The Witness: That is the slope of the bank. It is 1 to 1.

The Court: 1 to 1?

The Witness: 1 to 1. You will notice it widens out here on account of this roadway going down.

The Court: Yes, I see. Very well.

Mr. Crump: You may take that map with you, Mr. Gregg.

(Witness excused.)

(Rep. Tr., p. 307, line 2, to p. 308, line 19.)

The Court: This is the time when I announced I would be ready to make some decision in connection with the matter. It would be desirable, in instances like this where counsel have been assiduous and energetic and have filed long briefs and made great preparation, if time would permit the filing of a written opinion. But I think it is more important, on injunction matters such as this, that as soon as I have come to a conclusion I should announce the decision without giving myself the pleasure of writing a long opinion which would be reported in

the textbooks and perhaps referred to by subsequent lawyers and subsequent judges.

In doing so, of necessity I have not had the time to do more than just barely outline my views. I will try and state them, and if there is any point which has been made by either counsel which is overlooked, if you will call my attention to it I will indicate my views on that particular subject, but I do not think that that will be necessary.

The first thing to decide in connection with this matter is whether or not the motion to dismiss is well taken, because if the motion to dismiss is well taken, of necessity, any application for a preliminary injunction would fall, and [340] the motion to dissolve it would automatically be granted.

In considering the question on the motion to dismiss, the first thing to determine is whether or not there is a Federal question. Obviously there is no diversity of citizenship alleged or apparent in the proceedings. It is certainly not apparent from the complaint on file in the matter.

But, as I view the authorities, it is not necessary that there be diversity of citizenship in a case raising a constitutional question concerning any action by a state or any of its agencies of government. If there is any doubt about that, I think the question was settled by the Supreme Court in the case of *Raymond v. Chicago Traction Company*, 207 U. S. 20, at page 35.

There is no doubt but what the city and the city government, the city council and all of its agencies, are agencies of the state. That question is settled

by Home Telephone Company v. City of Los Angeles, 227 U. S. 278, where action by the city council was under assault on the ground that it violated the due process clause and I believe the contract clause of the Constitution, and the Court held that the city was an agency of the state and that the constitutional question was properly raised in that case.

But because it is an action of the state does not necessarily bring it within the provisions of 28 U. S. Code, Section 380, requiring a three-judge court, but is action which may be reached otherwise under the authority of such cases as *Rorick v. Commissioner*, 307 U. S. 208, *Ex Parte Collins*, 277 U. S. 65 and *Re Everglades*, 293 U. S. 52. That such action is sufficient to permit the invocation of any constitutional rights under the Fourteenth Amendment is definitely held by *Home Telephone Company v. City of Los Angeles*, 227 U. S. 278; *Raymond v. Chicago Traction Company*, 207 U. S. 20; *Dobbins v. City of Los Angeles*, 195 U. S. 223, and *Ex Parte Young*, 209 U. S. 123, as I read them all. [341]

The defendants make the contention that the assertion in the plaintiffs' complaint that the action of the City is void as being an excess of their authority under either the charter or the state constitution or any state statute is, in my judgment, not sufficient to take away the jurisdiction of this court on the constitutional question, as the defendants contend was the holding *Barney v. City of New York*, 193 U. S. 430, and as was the holding in the *Barney* case. But as I indicated during the course of the argument I think that the *Barney* case is not appli-

cable here but that the doctrine outlined in *Home Telephone Company v. City of Los Angeles*, 227 U. S. 278, and in *Snowden v. Hughes*, 321 U. S. 1, is the prevailing doctrine. Incidentally, in both of those cases they severely criticize the *Barney* case.

In the *Home Telegraph* case the Court, in reviewing, for instance, the *Raymond v. Chicago Traction Company* case and several others, along with the *Barney* case and *Ex Parte Young*, went on to call attention to the fact that in the *Raymond v. Chicago Traction Company* case it:

“concerned the repugnancy to the Fourteenth Amendment of a reassessment made by a state board of equalization, and the suit was originally commenced in a Federal Court. It was pressed that as the claim of the complainant was in effect that the board in the reassessment had violated an express requirement of the state constitution, in that the board had ‘disobeyed the authentic command of the state by failing to make its valuations in such a way that every person shall pay a tax in proportion to the value of his property,’ the act of the subordinate board could not be deemed the act of the state. This contention was [342] held to be unsound, and it was decided that even although the act of the board was wrongful from the point of view of the state constitution or law, it was nevertheless an act of a state officer within the intendment of the Fourteenth Amendment. It was pointed out that, as

the result of the enforcement of the reassessment would be an assertion of state power accomplishing a wrong which the Fourteenth Amendment forbade, the claim of right to prevent such act under the Fourteenth Amendment 'constitutes a federal question beyond all controversy.' "

The Court then goes on and quotes similar provisions from previous cases.

So I think that if the complaint otherwise meets the test of what constitutes a statement of a cause of action, it should not be dismissed on the grounds that I have indicated.

I wish to make it clear that in so holding I do not feel that it is within the power or the duty of this court to pass on any of what we have referred to in the course of the argument as the "state questions." They are and must be left for decision by the state court. So that as to whether or not the complaint states a cause of action simmers down to whether or not, disregarding those state questions, the complaint is good.

I realize of course the offered plea of the doctrine that every intendment for the validity of the exercise of the police power should be made. But in view of the allegations in the complaint concerning the some 20-odd years or thereabouts of having this property zoned in the residential zone area, the fact that the plaintiffs in this case have built their homes during that period of time and invested a [343] large sum of money, that in the meantime they have

paved their streets, been included in bond issue districts for the development of parks and the like, and in view of the allegation in the complaint that the defendant Gregg recently purchased this property and did so while it was still zoned for residential purposes, it seems to me that just pointing those out as a few of the things, and certainly by no means summarizing all of the allegations in the complaint which I think make it good, in view of those general allegations and the others contained in the complaint that it does state a cause of action under the Dobbins case and under the Jardine case.

It was in the case of *Jardine v. City of Pasadena*, 199 Cal. 64, that the Supreme Court of the State of California announced the doctrine—and I feel as though it is binding upon me—that a person who is not immediately affected as to a particular parcel of property on a zoning ordinance, or an ordinance of a city, has a right to come into court and can state a cause of action concerning the action of a city in zoning or permitting the establishment of some industry or business on property adjoining his or in that vicinity.

So I think not only do they state a cause of action, but under the Dobbins case and under the Jardine case the plaintiffs here are in court, and properly so.

As to the Dobbins case, I cannot see any difference in principle—that Dobbins there was the person who got the zoning in his favor and expended money and these plaintiffs here in whose favor the zoning was and on that basis they expended money

for the purpose of their homes—I think the principle is the same, and the Dobbins case I would regard as authoritative for stating a cause of action under the facts outlined in this case, and it is also authoritative on the [344] proposition that a city can be estopped by the application of the principles of equitable estoppel to an action of the city in connection with the building of buildings or the use of property depending upon some action of the city.

On the question of comity, that the state court already had jurisdiction and that this court must not interfere, if the Supreme Court of the State of California had the power under the decisions to issue a writ of supersedeas—not whether they would or would not, or whether they should or should not, but if they had the power to issue a writ of supersedeas—then I think that the doctrine of comity would require this court to decline jurisdiction, because if they had the power to issue a supersedeas then the question as to whether or not the action of the city in granting the permit to Gregg was a violation of the plaintiffs' rights, or the residents in that area and their rights under the Fourteenth Amendment, could be preserved and the parties held in status quo until such time as the Supreme Court of the United States would have the opportunity to determine whether or not there was a violation of the Fourteenth Amendment in this action of the city.

Under *Pennekamp v. Florida*, 328 U. S. 331, and other cases—this case appears to be the latest one on the subject—the Supreme Court is the final arbit-

ter on the question of whether or not the Federal Constitution is violated. There the court said, at page 335:

“The Constitution has imposed upon this court final authority to determine the meaning and application of those words of that instrument (that is, the Constitution) which require interpretation to resolve judicial issues.”

And there are other cases along the same line.

So that there being no power in the state Supreme Court to preserve this constitutional question which I think the plaintiffs have raised and under their complaint have stated a cause of action for violation of the Fourteenth Amendment, that being so I think that under the doctrine of comity I should not decline jurisdiction but should, in view of the fact that there is jurisdiction under the complaint, retain jurisdiction so that this constitutional question can be preserved for final decision by the Supreme Court of the United States in the event that the matter is not otherwise disposed of by the State Supreme Court in connection with the questions which are raised and which do not involve the Constitution of the United States. For instance, the state court might decide the state questions, as I refer to them, against the defendants in the state action, and if that were true it would never require a decision on the Fourteenth Amendment. But the plaintiffs here are entitled to have that question preserved.

Some question was raised that these plaintiffs here were bound by the class suit and that they

could not shop around for a forum. If they were bound by the class suit filed in the Superior Court, I would say that under the doctrine that the litigants cannot merely shop around for a forum, that would be true. But as I read the complaint, these plaintiffs here did not join in the class action filed in the state court, and as I view the cases and the law in that respect, the class action is binding upon only those who take advantage of the class action by indicating in one way or another, either joining in the suit or taking advantage of the fruits of the suit in the event there are any fruits of such suits, that they desire to be bound. From the pleadings in this case it does not appear that that is true here. [346]

Another point was raised, that the right of the defendant Gregg to take his rock from his land could not be affected by the filing of this suit and would entitle the defendants here to a dismissal of the action. As I suggested this morning to counsel, in order for me to hold with them on that ground I would first have to hold the general zoning ordinance and all the previous zoning ordinances of the city which placed this site here in other than the permissible zone for rock crushers to be void and unconstitutional.

The other point that I think was raised was that the defendant Gregg was not a proper party, but as I read *United States v. Classic*, 313 U. S. 299, and as I quoted it to you the other day, I believe that he is a proper party because the defendant Gregg would not be in there operating now if he

did not have the permit from the city. In other words, it is the city action which gives the defendant Gregg's right to mine rock their vitality and give them life. Otherwise he might have some in court rights existent but he would not have the right to do anything, and it is by virtue of the city that the defendant Gregg is able to go in there and to mine rock upon this land. For that reason I think that Gregg is a proper party to the suit, and for the reasons that I have indicated I think that the complaint states a cause of action and should not be dismissed. Therefore the motions to dismiss on behalf of the city and the defendant Gregg are both denied.

The question next arises as to whether or not there being a cause of action stated in the complaint the preliminary injunction should be granted or, as stated in its present light, the motion to dissolve the preliminary injunction should be granted.

As I have indicated, or as counsel can see from my remarks, [347] I feel that the constitutional question has been raised sufficiently so that it should be preserved in order to enable the Supreme Court of the United States to pass upon it. I think it would be wrong to proceed with this case and decide that question independently of the proceedings in the state court, because the state court might grant the relief requested by the plaintiffs in that case and deny the rights to Gregg, in which event, if the rights were denied to Gregg, then of course this action would be abated because the plaintiffs here, while different plaintiffs, seek the same relief that they seek from Gregg.

It is true that the damage to the plaintiffs is great and irreparable. The testimony of the defendant Gregg to the effect that in the next two years he would dig out an area there of probably not to exceed a net of seven acres, as near as I can estimate, but at least not over an area of 15 acres, and that these pits can be refilled, seems to me to be a matter that should be taken into consideration in connection with the exercise of any equitable powers of this court in granting or refusing an injunction pendente lite.

I think the injunction pendente lite should be granted, but I think that in view of the motion to dismiss, and even though the parties have not made a motion to stay, the injunction pendente lite should be granted but that the suggestion contained in the case of *Railroad Commission v. Pullman*, 312 U. S. 496, should be followed. Reading from page 501:

“Regard for these important considerations of policy (that is the policy of having regard for the right of the state to determine in its own forums the excesses or lack of them of any of its governmental agencies in violation of the state law) in the administration of federal equity jurisdiction is decisive here. If there was no warrant in the state law for the commission’s assumption of [348] authority there is an end of the litigation; the constitutional issue does not arise. The law of Texas appears to furnish easy and ample means for determining

the commission's authority. Article 6453 of the Texas Civil Statutes gives a review of such an order in the state courts. (Incidentally, I think in this case there had not been a previous state action filed.) Or, if there are difficulties in the way of this procedure of which we have not been apprised, the issue of State law may be settled by appropriate action on the part of the state to enforce obedience of the order. (Citing cases and statutes.) In the absence of any showing that these obvious methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the District Court should exercise its wise discretion by staying its hands.

“We therefore remand the cause to the District Court, with directions to retain the bill pending a determination of proceedings, to be brought with reasonable promptness, in the state court in conformity with this opinion.”

This being a court of equity, the court has the power in granting or denying any relief to put such conditions upon it as may, in the mind of the chancellor, seem just and right.

So that the order will be that the preliminary injunction will be granted, but that all proceedings in this court will be stayed pending the final disposition of the proceedings in the state court upon the defendant Gregg filing here an appropriate bond, conditioned upon refiling such portion [349]

of the land as he shall excavate in the event the case is finally decided against him in the state court.

Now I understand from the defendant Gregg here that it was not a terrific job to refill those holes.

Mr. Crump: Would your Honor permit an interruption? I am sorry but I didn't quite get your statement.

I understood you to say that the injunction would be granted but I didn't understand you to state that there was any limitation on the injunction. In other words, whether Mr. Gregg could proceed in this limited area if he puts up a bond. Was that the sense of your statement?

The Court: The injunction will be granted, but the proceedings may be stayed—that is, the injunction may be stayed—if he puts up a bond, and I am not here pretending to determine the questions of public policy on this preliminary hearing as to the conditions under which he shall operate. The conditions of the stay will further be that any operations that he conducts there will be in conformity with the order of the state court and of the terms of the permit itself.

Now the question is on the amount of a bond which the defendant Gregg should put up, or it may be that the defendant will not wish to stay it. In the event you desire to have some time to give consideration to that, I can leave the injunction in force as it now is until next Monday.

Mr. Crump: We prefer that your Honor fix the amount of the bond at this time.

The Court: At the present time?

Mr. Crump: Yes.

The Court: I think that a bond in the penal sum of \$50,000 would be sufficient if deposited on the part of the defendant Gregg and conditioned upon his refilling the land [350] in its present condition in compliance with such order of this court, the District Court, as might be made in the event the question is ultimately decided against him.

Mr. Crump: You say the order of this court. Of course that would be subject to any right of appeal.

The Court: Of course.

Mr. Crump: Yes.

Mr. Clark: May I make one statement, your Honor?

The transcript on appeal, the reporter's transcript, which was the important one in the state case, was filed yesterday and we expect expeditiously will move to the point of its certification for formal filing in the Appellate Court, and we do have in mind making an application to the Supreme Court to retain jurisdiction of the case rather than to transfer it, as it has the right to do, presently for determination by a District Court of Appeals, subject to the right to have it brought back to the Supreme Court then for final determination.

We also hope that by reason of the importance of the questions involved that the Supreme Court will set a very early date in the coming year for the consideration of that appeal. So I would feel

that probably in the next four months we might reasonably expect at least that that matter will have been briefed, argued and submitted to the Supreme Court for decision.

Now, might I ask your Honor, however, in view of our experience in encountering delays in those matters, and the fact that if Mr. Gregg does decide to go ahead, the excavated area would be much larger—would your Honor retain jurisdiction to readjust the bond upon any proper showing that any readjustment should be made?

The Court: I do not think so. I will answer that question [351] in a moment after I make another observation.

In fixing a bond in the sum of \$50,000, I do not wish to be understood as fixing that as a possible measure of damages. In fixing that bond in that sum and in ordering the stay as I have done, I do not wish to be understood as saying that the parties plaintiff do or do not suffer any irreparable injury in connection with the dust and the noise and the other matters of inducement alleged in the complaint. I fix it only in that sum because I feel that it will be sufficient to warrant the refilling of the land, together with the power which exists in the District Court to enforce compliance with its orders, as indicated recently in the celebrated case of *United States v. John L. Lewis*, and also in the case arising in this district known as *United States v. Penfield*, where the Supreme Court said I had no discretion to fine a man for contempt, I could only put him in jail until he complied.

So I think that the bond in the penal sum of that amount, together with the powers of the District Court to enforce compliance with its orders in the event that it should become necessary to refill, will be sufficient and my order to stay it will be final. Of course that is always subject to reopening any decision or any matter in this court in the event conditions change and the parties desire to take advantage of such procedure as the law allows.

Another reason that induces me to fix a bond in the sum of \$50,000 rather than a higher amount, because I doubt in my experience that the sum of \$50,000 would refill one of those holes, is because the state Superior Court, after a long trial of the matter, did not grant the injunction.

Are there any other points that I have missed?

Mr. Clark: We are satisfied with your Honor's explanation.

Mr. Hearn: May I inquire as to what extent, if any, the [352] injunction will directly affect the City of Los Angeles?

The Court: The injunction as it is in force now restrains the City and Gregg and their agents from carrying out the terms of the permit.

Mr. Hearn: I notice the preliminary injunction in effect now——

The Court: That will be continued in force. The motion to dissolve the preliminary injunction is denied, and it will be continued in force on the same terms.

Mr. Crump: I understand then, your Honor, that while Mr. Gregg is required to put up \$50,000 as a bond to dissolve the injunction, the plaintiffs only have to have a \$5000 bond?

The Court: I think that is sufficient. I think the matter will work out.

Are there any other matters to be taken up?

Mr. Clark: None, your Honor.

The Court: Very well.

(Rep. Tr., p. 357, line 7, to p. 374, line 8.)

Submitted by

DONALD J. DUNNE,
WOOD, CRUMP, ROGERS,
ARNDT & EVANS.

By /s/ GUY RICHARDS CRUMP,
Attorneys for Defendant,
D. J. Gregg.

Address: 458 So. Spring Street, Los Angeles 13,
Calif. [353]

Affidavit of Service by Mail

State of California,
County of Los Angeles—ss.

Anna M. Anderson, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's

business address is 458 South Spring Street, Los Angeles 13, California; that on the 7th day of January, 1948, affiant served the within and above document, "Reporter's Transcript of Evidence and Proceedings on Hearing re Preliminary Injunction and Motion to Dissolve the Same," on the plaintiffs in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said plaintiffs, at the office address of said attorneys, as follows: "Oliver O. Clark and Robert A. Smith, Suite 710, 643 South Olive Street, Los Angeles 14, California"; and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorneys for the person by and for whom said service was made; that there is delivery service by United States mail between the place of mailing and the place so addressed.

/s/ ANNA M. ANDERSON.

Subscribed and sworn to before me this 7th day of January, 1948.

[Seal] /s/ HERTHA N. EBERT,

Notary Public in and for the County of Los Angeles, State of California. [354]

In the United States District Court, Southern
District of California, Central Division

No. 7765—P. H.

HENRY WALLACE WINCHESTER, et al.,
Plaintiffs,

vs.

J. D. GREGG, and the CITY OF LOS ANGELES,
a municipal corporation,

Defendants.

PRELIMINARY INJUNCTION

To the Defendant J. D. Gregg, and to His Attorneys of Record Herein, and to the City of Los Angeles, a Municipal Corporation, and Its Attorneys of Record Herein:

In the above entitled action, plaintiffs having filed their duly verified complaint, in which, among other things, they pray for an injunction, and an order to show cause, and a temporary restraining order having heretofore issued herein, and upon the hearing of said order to show cause why a preliminary injunction should not be issued it appeared to the above entitled court that a preliminary injunction should issue in the premises,

This order shall be effective as to the property lying northerly of Glenoaks Boulevard upon the filing of a surety bond in the sum of \$5,000.00 and shall be effective as to the property lying southerly

of Glenoaks Boulevard upon the filing of an additional surety [355] bond in the sum of \$10,000.00, until further order of the Court.

Now, therefore, you, the defendants herein, and the said J. D. Gregg, his agents, servants and employees are hereby absolutely enjoined and restrained, during the pendency of the above entitled action and until its final determination, or until the court shall otherwise order, from excavating, or conducting any other operation for the production of rock, sand, or gravel within or upon that certain real property described in plaintiffs' complaint herein, and known and described as follows, to wit:

Lots 1, 2, 4, 5, 6, 7, 13 and 14 in Block 19; the Easterly 150 feet of Lot 12 in Block 8; Lots 4 to 9 inclusive, and Lots 15 to 19, inclusive, and Lots 21 and 22, and the Easterly 280 feet of Lot 14, in Block 17; of the Los Angeles Land and Water Company's subdivision of a part of the Maclay Rancho as per map recorded in Book 3 of Maps at Pages 17 and 18 in the Office of the County Recorder of Los Angeles County, California.

This preliminary injunction is issued because it appears to the Court that unless immediately restrained, said defendant John D. Gregg, his agents, servants and employees will continue to excavate with a six ton power shovel upon the land covered by the variance permit described in the complaint herein, for production of rock, sand, and gravel

from said land and will remove said materials from said property, and dispose of them in the market, and that the conduct of said operations will seriously, substantially, and irreparably damage plaintiffs, by interfering with their comfortable enjoyment and use of their respective properties and homes described in the complaint herein, and depreciating the value of their said properties, respectively, and by creating a large deep pit upon the property excavated, which cannot reasonably be refilled and which will constitute permanently a hazard [356] and detriment to the health and safety of said plaintiffs and their families, and to their said properties.

Given under my hand and seal of the United States District Court, Southern District of California, Central Division, this 9th day of December, 1947, 1:34 p.m.

/s/ PEIRSON M. HALL,
Judge.

Judgment entered Dec. 9, 1947. Docketed Dec. 9, 1947. C.O. Book 47, Page 371. Edmund L. Smith, Clerk, by John A. Childress, Deputy.

[Endorsed]: Filed Dec. 9, 1947.

[Title of District Court and Cause.]

ORDER IN RE PRELIMINARY INJUNCTION
AND STAY THEREOF

Good cause appearing therefor, it is hereby ordered that the preliminary injunction issued herein on December 9, 1947, and now in force be, and the same is continued in force, upon the terms and conditions therein set forth, until the further order of the Court herein; provided, however, that the operation of said preliminary injunction and all other proceedings in this case shall be stayed pending a final decision in the case of Wheeler, et al., Plaintiffs, vs. J. D. Gregg, et al., Defendants, No. 522,031 in the Superior Court of the State of California, in and for the County of Los Angeles, and which is now pending on appeal in the Supreme Court of the State of California, if, when and as defendant J. D. Gregg shall post a bond in the penal sum of \$50,000.00, executed [358] by a corporate surety approved by this court, conditioned upon said defendant J. D. Gregg refilling, with reasonable diligence and according to such orders as this Court may hereafter make, such portion of the land described in the said preliminary injunction lying northerly of Glenoaks Boulevard, as he shall have excavated subsequent to December 9, 1947, if a final judgment be entered in a court of competent jurisdiction holding that said J. D. Gregg has and has had no right so to excavate; and provided, further, that any operation con-

cerned with the excavation, processing and transportation of rock, sand and gravel now contained in the lands described in said preliminary injunction, during the period of any suspension of the operation of said preliminary injunction, shall be conducted in accordance with the requirements therefor set forth in the conditional use permit granted by the City Council of the City of Los Angeles to said J. D. Gregg, dated October 2, 1946, and in accordance with the requirements set forth in the judgment heretofore made and entered in said action No. 522,031 in the Superior Court of the State of California, in and for the County of Los Angeles,

It is further ordered that the defendants' motion to dismiss be and the same is hereby denied.

It is further ordered that the motion of defendant J. D. Gregg to strike portions of the complaint be and the same is hereby denied.

It is further ordered that the motion of Defendant J. D. Gregg to dissolve the preliminary injunction be and the same is hereby denied.

Dated at Los Angeles, this 18th day of December, 1947, at 10:05 o'clock, a.m.

/s/ PEIRSON M. HALL,
Judge.

Judgment entered Dec. 18, 1947. Docketed Dec. 18, 1947. C. O. Book 47, Page 501. Edmund L. Smith, Clerk, by J. M. Horn, Deputy.

[Endorsed]: Filed Dec. 18, 1947. [359]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE
CIRCUIT COURT OF APPEALS

Notice is Hereby Given that defendant J. D. Gregg, above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the order of the United States District Court, Southern District of California, Central Division, granting a preliminary injunction herein, which order is entitled "Preliminary Injunction," dated the 9th day of December, 1947, and entered herein on the 9th day of December, 1947.

Dated: January 6, 1948.

DONALD J. DUNNE,
WOOD, CRUMP, ROGERS,
ARNDT & EVANS,

By /s/ GUY RICHARDS CRUMP,
Attorneys for Defendant,
J. D. Gregg. [360]

[Affidavit of service by mail attached.]

[Endorsed]: Filed Jan. 7, 1948.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 368, inclusive, contain full, true and correct copies of Complaint in Equity for Injunction and Damages; Temporary Restraining Order; Notice of and Motion to Dismiss for Lack of Jurisdiction of Subject-Matter; Motion to Dissolve Temporary Restraining Order; Affidavits of John D. Gregg, Donald J. Dunne, Harold A. Henry and J. Win Austin in Opposition to Preliminary Injunction; Affidavits of Louise Taylor, H. B. Lynch, Albert M. Scheble, R. L. Farley and Jeanne Moore in Support of Pending Application for Preliminary Injunction; Reporter's Transcript of Evidence and Proceedings on Hearing re Preliminary Injunction and Motion to Dissolve the Same; Preliminary Injunction; Order in re Preliminary Injunction and Stay Thereof; Notice of Appeal; Statement of Points Relied on by Appellant on Appeal from Order Granting Preliminary Injunction and Designation of Contents of Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$90.95 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 16th day of February, A. D. 1948.

[Seal] EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 11861. United States Circuit Court of Appeals for the Ninth Circuit. J. D. Gregg, Appellant, vs. Henry Wallace Winchester, Ernest Joseph Stewart, et al., Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed February 17, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States District Court, Southern
District of California, Central Division

No. 7765—P. H.

HENRY WALLACE WINCHESTER, et al.,
Plaintiffs,

vs.

J. D. GREGG, and the CITY OF LOS ANGELES,
a municipal corporation,

Defendants.

ORDER EXTENDING THE TIME FOR FIL-
ING THE RECORD ON APPEAL AND
DOCKETING THE APPEAL

Upon reading and filing the affidavit of Donald
J. Dunne, and good cause appearing therefor,

It Is Hereby Ordered that the time for filing
the record on appeal and docketing the appeal from
the order of the United States District Court,
Southern District of California, Central Division,
granting a preliminary injunction herein, is hereby
extended to and including the 26th day of Febru-
ary, 1948.

Dated at Los Angeles, California, this 16th day
of February, 1948, at 10 o'clock a.m.

PEIRSON M. HALL,
Judge.

A True Copy, Attest, etc., Feb. 16, 1948. Edmund
L. Smith, Clerk U. S. District Court, Southern
District of California. By Theodore Hocke, deputy.

[Endorsed]: Filed Feb. 16, 1948.

[Title of District Court and Cause.]

APPLICATION FOR ORDER EXTENDING
THE TIME FOR FILING THE RECORD
ON APPEAL AND DOCKETING THE
APPEAL

State of California,
County of Los Angeles—ss.

Donald J. Dunne, being first duly sworn on oath,
deposes and says:

That affiant is one of the attorneys of record in the above entitled action; that Notice of Appeal to the Circuit Court of Appeals from the order of the United States District Court, Southern District of California, Central Division, granting a preliminary injunction herein, was filed herein on the 7th day of January, 1948; that the time for filing the record on appeal and docketing the appeal has not expired; that the record on appeal herein is voluminous, consisting of the pleadings and affidavits and counter-affidavits aggregating several hundred pages and including as parts thereof and exhibits thereto certain aerial mosaic maps and photographs which it was necessary to reproduce in order to provide sufficient copies for the record on appeal; that by reason of the foregoing the preparation of said record has been delayed and that unless an extension of time for filing the record on appeal and docketing the appeal is granted, that the time prescribed by the Federal Rules of Civil

Procedure will have expired before the said record on appeal may be filed and docketed in the United States Circuit Court of Appeals for the Ninth Circuit.

Wherefore, affiant respectfully prays that the Court make its order extending for ten days the time for filing the record on appeal and docketing the appeal herein.

/s/ DONALD J. DUNNE.

Subscribed and Sworn to before me this 16th day of February, 1948.

/s/ JAMES A. MILLER,
Notary Public in and for
said County and State.

[Endorsed]: Filed (DC) Feb. 16, 1948.

[Endorsed]: Filed (CCA) Feb. 18, 1948.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11861

J. D. GREGG,

Appellant,

vs.

HENRY WALLACE WINCHESTER,

Appellee.

STATEMENT OF POINTS RELIED ON BY
APPELLANT ON APPEAL FROM ORDER
OF THE UNITED STATES DISTRICT
COURT, SOUTHERN DISTRICT OF CALI-
FORNIA, CENTRAL DIVISION, GRANT-
ING A PRELIMINARY INJUNCTION

The points upon which appellant intends to rely on this appeal are as follows:

1. The court erred in not dismissing plaintiffs' complaint for failure to state a claim.

2. The District Court of the United States was without jurisdiction to grant a preliminary injunction, there being no federal question presented.

3. Where diversity of citizenship does not exist, jurisdiction of the United States District Court can be sustained only on the ground that the case arises under the Constitution of the United States, or under a federal statute, which is not the case here.

4. Plaintiffs' cause of action is essentially one to abate or enjoin a public nuisance, and is therefore an action in rem or quasi in rem.

5. The preliminary injunction should have been denied both under the provisions of Section 265 of the Judicial Code, being Section 379 of Title 28 USCA, and under the doctrine of comity.

6. The controversy as well as the right created by the Constitution or laws of the United States must be a genuine one and a present one, which is not the case here, not merely a possible or conjectural one.

7. The business of excavating rock and gravel by the owner from lands belonging to him is a lawful and useful occupation, and an ordinance prohibiting such owner from so doing is an unreasonable restraint upon the use of his property and an unwarranted interference in the carrying on of a lawful business and the use and enjoyment of property.

8. Where the operation of a business is not a nuisance per se, a decree or order should not enjoin more than the specific things which constitute the nuisance and should never go beyond the requirements of the particular case.

9. There can be and is no estoppel against the City of Los Angeles with reference to the granting of the conditional use permit to Gregg.

10. The granting of the permit to Gregg does not constitute an unconstitutional taking of the property of plaintiffs without just compensation nor does it constitute a denial of due process of law.

11. Plaintiffs may not impeach the motives of the City Council in granting the permit.

12. The wisdom or expediency of granting the permit was for the City Council to decide and is not subject to judicial review.

13. The power vested in the Planning Commission in the first instance, and in the City Council on appeal, to grant a conditional use permit under Section 12.24 of Ordinance 90,500 does not constitute an unlawful delegation of legislative authority, and does not present a federal question.

14. The court erred in granting the preliminary injunction for the reasons hereinbefore set forth.

Dated: February 25, 1948.

DONALD J. DUNNE,
WOOD, CRUMP, ROGERS,
ARNDT & EVANS,
By /s/ DONALD J. DUNNE,
Attorneys for Appellant
J. D. Gregg.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Feb. 26, 1948.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION BY APPELLANT OF THE
PARTS OF THE RECORD NECESSARY
FOR THE CONSIDERATION OF THE
POINTS RELIED ON BY APPELLANT
ON APPEAL FROM ORDER OF THE
UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION, GRANTING A PRE-
LIMINARY INJUNCTION

Appellant J. D. Gregg, through his counsel, hereby designates the entire record on appeal in this action, which appellant believes necessary to be printed for the consideration of the points relied upon by appellant on said appeal, said record consisting of the following:

1. The bill of complaint in equity.
2. Defendant J. D. Gregg's motion to dismiss the complaint.
3. Temporary restraining order, dated November 15, 1947.
4. Motion to dissolve temporary restraining order, dated November 29, 1947.
5. Affidavit of J. D. Gregg in opposition to the granting of a preliminary injunction, and exhibits thereto attached.
6. Affidavit of Donald J. Dunne, filed in behalf of defendant J. D. Gregg, in opposition to the granting of a preliminary injunction, and exhibits thereto attached.

7. Affidavit in behalf of City of Los Angeles in opposition to the granting of a preliminary injunction, and exhibits thereto attached.

8. Counter affidavits filed in behalf of plaintiffs.

9. Reporter's transcript of the evidence and proceedings (exclusive of argument of counsel).

10. Order entitled "Preliminary Injunction," dated and entered December 9, 1947.

11. Order in re Preliminary Injunction and stay thereof.

12. Notice of appeal.

13. Statement of points on which appellant intends to rely.

Dated: February 25, 1948.

DONALD J. DUNNE,
WOOD, CRUMP, ROGERS,
ARNDT & EVANS,
By /s/ DONALD J. DUNNE,
Attorneys for Appellant
J. D. Gregg.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Feb. 26, 1948.

No. 11861

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. D. GREGG,

Appellant,

vs.

HENRY WALLACE WINCHESTER, ERNEST JOSEPH STEW-
ART, *et al.*,

Appellees.

APPELLANT'S OPENING BRIEF.

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

FILED

MAY - 7 1938

PAUL P. O'BRIEN,
CLERK

DONALD J. DUNNE,
215 West Seventh Street, Los Angeles 14,
WOOD, CRUMP, ROGERS, ARNDT & EVANS,
458 South Spring Street, Los Angeles 13,

Attorneys for Appellant.

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No. 11861

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. D. GREGG,

Appellant,

vs.

HENRY WALLACE WINCHESTER, ERNEST JOSEPH STEWART, *et al.*,

Appellees.

APPELLANT'S OPENING BRIEF.

Statement Re: Jurisdiction of Court.

1. Appellees contend that the District Court has jurisdiction of the subject matter of this action because of the Fourteenth Amendment to the United States Constitution. This is denied by the Appellant.

2. The Circuit Court of Appeals has jurisdiction upon appeal to review the order in question by virtue of Judicial Code, Sec. 129 (28 U. S. C. A. 227).

3. The only allegations in Appellees' complaint which purport to confer jurisdiction on the District Court are the conclusions of law pleaded in Paragraphs I, XXV, XXXVI and XXXVII of the complaint. [Tr. Vol. I, pp. 3, 53, 54.]

Statement of the Case.

Appellant is the owner of approximately 115 acres of land located near Roscoe in the San Fernando Valley within the boundaries of the City of Los Angeles, having substantial value only for the excavation and production of rock, sand and gravel. [Tr. Vol. I, p. 301.] This is the property which is the subject matter of the within action. [Tr. Vol. I, p. 4.] Since the year 1934 Appellant had been operating a gravel pit and processing plant on adjoining property owned by him, on which the deposit of available materials is about exhausted. [Tr. Vol. I, pp. 274, 284, 285.]

On June 2, 1946, pursuant to the provisions of Sec. 12.24 of the Los Angeles Municipal Code, Ordinance 90,500, Appellant filed an application with the City Planning Commission of the City of Los Angeles requesting a Conditional Use Permit authorizing him to use the property owned by him for the purpose of developing a natural resource, to-wit, to mine rock, sand and gravel. [Tr. Vol. I, p. 278.] The provisions of said Sec. 12.24 are set forth in Tr. Vol. I, p. 162.

Thereafter and pursuant to the procedure prescribed by Sec. 12.32C of said Municipal Code [Tr. Vol. I, p. 190] a public hearing was had before the City Planning Commission. [Tr. Vol. I, pp. 278, 279, 280.] After the hearing the Commission denied the application. [Tr. Vol. I, p. 280.] Thereupon Appellant appealed to the City Council from the Commission's order denying his application [Tr. Vol. I, pp. 280, 281] pursuant to Section 12.24C and Sec. 12.32E of said Municipal Code. [Tr. Vol. I, pp. 164, 165, 192.]

Upon appeal the City Council referred the matter to its Planning Committee pursuant to Sec. 12.32E of said

Code, which Committee held a public hearing attended by about 250 persons, after which the Committee recommended that the Appellant's application be granted. [Tr. Vol. I, p. 281.] Thereafter on October 2, 1946, another public hearing was had before the City Council as a whole which was attended by a large number of persons and both proponents and opponents were given full opportunity to be heard. At the conclusion of the hearing the City Council adopted the report of its Planning Committee and granted Appellant the Conditional Use Permit allowing him to excavate for rock, sand and gravel from the subject property upon certain prescribed conditions. [Tr. Vol. I, pp. 281, 282, 283, 284.]

Thereupon, and pursuant to said Permit, Appellant commenced operations for the excavation and removal of rock, sand and gravel. [Tr. Vol. I, p. 285.]

On November 22, 1946, twenty-six persons, alleged to be owners of property in the vicinity of the permit area, filed an action in the Superior Court of the State of California, in and for the County of Los Angeles, entitled Wheeler, *et al.* v. Gregg, *et al.*, No. 522031. That complaint sought to enjoin Gregg from operating under the said Permit, and was substantially identical with the Complaint in Equity filed in this proceeding. It was prepared, served and filed by the same attorneys who represent Appellees in this proceeding [Tr. Vol. I, p. 286; Vol. II, pp. 319 to 380, incl.] *and alleged that the suit was brought on behalf of plaintiffs and all others similarly situated* [Tr. Vol. II, p. 369], which includes plaintiffs in this case.

A preliminary injunction was denied in that Superior Court action [Tr. Vol. I, p. 286] and after a trial before Hon. Alfred L. Bartlett, Judge of said Superior Court,

lasting from May 28, 1947 to September 10, 1947, a judgment was entered on September 10, 1947, in favor of defendant Gregg (Appellant herein), denying plaintiffs an injunction or damages [Tr. Vol. I, p. 287, Vol. II, pp. 458 to 461, incl.] The judgment was supported by Findings of Fact and Conclusions of Law whereby every issue was determined against the plaintiffs, including a finding that the granting of the Permit was not in violation of either the Constitution of the State of California or the Constitution of the United States, and that it was within the police power of the City. [Tr. Vol. II, p. 447.] A copy of the Pleadings and Judgment in that case appears in Tr. Vol. II, pp. 319 to 461, incl.

An appeal from that Judgment is now pending in the Supreme Court of the State of California and has not yet been determined. [Tr. Vol. I, p. 287; Vol. II, pp. 462, 463.]

On November 14, 1947, this proceeding was commenced in the District Court by certain named plaintiffs alleged to be owners of property in the vicinity of the Gregg permit area. The allegations of the Complaint are substantially identical with the Complaint in the State case and this complaint was filed by the same attorneys. Both complaints pray for an injunction and for damages. [Tr. Vol. I, pp. 2 to 264, incl.]

A temporary restraining order and Order to Show Cause was issued herein *ex parte*. Appellant filed motions to dismiss and to dissolve the restraining order and in opposition to a preliminary injunction, supported by affidavits and Points and Authorities. [Tr. Vol. I, pp. 268 to 312, incl.; Vol. II, pp. 313 to 566, incl.; Vol. II, p. 583.]

After a hearing the District Court issued a preliminary injunction which provided that it should be effective as

to the parcels north of Glenoaks Boulevard when plaintiffs (appellees herein) have filed a \$5,000 bond and that it should be effective as to the parcels south of Glenoaks Boulevard when and if plaintiffs filed a \$10,000 bond. It enjoined Gregg from using the property for the commercial production of rock and gravel pending the trial of the suit or the further order of the Court. [Tr. Vol. II, p. 619.] The \$10,000 additional bond has not been filed and hence that portion of the preliminary injunction with reference thereto is not effective. The latter, however, does not relate to the 115 acres of land hereinabove referred to.

The Court also made an order that the operation of the injunction be stayed provided that Gregg file a bond in the sum of \$50,000 conditioned upon refilling any excavation he might make in the event that the litigation is eventually decided against him. [Tr. Vol. II, p. 622.]

This appeal is from the Order of the District Court granting the Preliminary Injunction.

Specification of Errors.

A. The Court erred in granting Appellees a preliminary injunction in this:

1. That the Complaint fails to state a cause of action;
2. That the Court has no jurisdiction because no diversity of citizenship is shown;
3. That the Court has no jurisdiction because no Federal question is presented;
4. That the case does not arise under the Constitution of the United States, or under a Federal statute;
5. That the granting of the permit to Gregg does not constitute an unconstitutional taking of property without just compensation;

6. That the granting of the permit to Gregg does not constitute a denial to Appellees of due process of law;

7. That the alleged controversy is not a genuine and present one under the Constitution of the United States, but is merely conjectural;

8. That the alleged cause of action is essentially one to enjoin the commission of an alleged nuisance by Gregg and, there being no diversity of citizenship, is solely within the jurisdiction of the State Court.

9. That where the operation of a business is not a nuisance *per se*, an order or decree of Court should not enjoin more than the specific things which constitute the nuisance and should never go beyond the requirements of the particular case.

10. That there can be and as a matter of law is no estoppel with reference to the granting of the conditional use permit to Gregg, as alleged in the complaint;

11. That the wisdom or expediency of granting the permit was for the City Council to decide and is not subject to judicial review and does not present a Federal question.

12. The District Court should have declined to take jurisdiction both under the provisions of Sec. 265 of the Judicial Code (28 U. S. C. A. 379) and under the doctrine of comity, because of the prior judgment of the Superior Court of the State of California, in and for the County of Los Angeles (an appeal from said judgment being now pending in the Supreme Court of California) denying to plaintiffs in a representative suit (brought on behalf of all persons similarly situated, including the appellees herein) the identical relief sought in this proceeding.

ARGUMENT.

I.

The Complaint Fails to State Facts Sufficient to Constitute a Cause of Action on the Federal Constitutional Grounds.*—1.

We realize that this appeal is taken from the Order of the District Court granting the preliminary injunction and not from the Order denying Appellant's motion to dismiss. However, we deem it proper to consider whether or not the complaint states a cause of action in order to determine the propriety of the Order granting the preliminary injunction, because if the District Court did not have jurisdiction of the case, it did not have authority to grant the preliminary injunction.

In approaching a consideration of the above stated proposition, there are only two factors to consider:

(a) Does the complaint state facts sufficient to sustain a finding that the act of granting Gregg a conditional use permit so as to expressly permit the use of his own land for the commercial production of rock and gravel, was not a proper exercise of the police power?

(b) Does the complaint state facts which would be sufficient to sustain a finding that the plaintiffs' (Appellees herein) have or possess property rights which are taken from them by the granting of the permit to Gregg?

With reference to proposition (a): Fundamentally, Gregg's right to remove rock and gravel from his *own* land does not derive from the permit. That right is inher-

*Arabic numbers following captions refer to corresponding numbers in our Specification of Errors.

ent in Gregg's ownership of the land. His right to remove rock and gravel from his own land is inseparable from his ownership of the fee title to that land. Unless and until *prohibited* by an exercise of the police power of the City of Los Angeles, Gregg had an unquestioned right to operate on any rock and gravel land owned by him.

The adoption of the zoning regulation by the City of Los Angeles, Ordinance No. 90,500 [Tr. Vol. I, p. 61 *et seq.*] was a *suspension* of that inherent right by an exercise of the police power. But the *right*, as distinguished from the permissibility to remove rock and gravel from his own land does not stem from or arise out of any action of the City Council, whether such action be valid or invalid.

Therefore, the act of the City Council in granting Gregg a conditional use permit did not create in Gregg any right which he had not theretofore possessed. It merely removed an *artificial impediment* and reinstated him in the inherent right which he had always possessed. By granting the permit the City Council simply surrendered the power to object to the exercise by Gregg of a right which he (and his predecessors in interest) always possessed as the owner of the property, until the adoption by the City of its zoning regulations; a right which he (and his predecessors in interest) had a right to exercise even after the adoption of the zoning ordinance, unless the adoption of the zoning ordinance was a reasonable and proper exercise of the police power.

Let us assume that Gregg had not applied for a permit but had simply commenced excavation on his own land. Would there be any Federal question involved? It is apparent that there would not be. It is also apparent that

if the City of Los Angeles attempted to enjoin Gregg from so proceeding in the absence of a permit that Gregg himself would be in a position to enjoin the City from interfering with his operations.

As is disclosed by affidavits in this record [Tr. Vol. II, pp. 463 to 520, incl.], the Superior Court in California by final judgment has twice enjoined such interference by the City of Los Angeles under similar circumstances.

As said in the case of *Sterling v. Constantin*, 287 U. S. 378, 77 L. Ed. 375:

“The existence and nature of complainants’ rights are not open to question. Their ownership of the oil properties is undisputed. Their right to the enjoyment and use of these properties subject to reasonable regulation by the State in the exercise of its power to prevent unnecessary loss, destruction and waste, is protected by the due process clause of the Fourteenth Amendment. *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 44 L. Ed. 729, 20 S. Ct. 576; *Lindsey v. National Carbonic Gas Co.*, 220 U. S. 61, 55 L. Ed. 369, 31 S. Ct. 337; *Walls v. Midland Carbon Co.*, 254 U. S. 300, 65 L. Ed. 276, 41 S. Ct. 118; *Bandini Petroleum Co. v. Superior Court*, 284 U. S. 8, 76 L. Ed. 136, 52 S. Ct. 103.”

The permit granted to Gregg does not restrict the Appellees in the use of their *own* property. It is merely permissive to Gregg, and not restrictive as to the Appellees.

How can it be said that it was not within the province of the City Council to merely remove an artificial impediment to the use by Gregg of his own property for lawful purposes?

How can it be said that the lawful use by *Gregg* of his own property constitutes an improper exercise by the *City of Los Angeles* of its police power?

The failure of a municipality to place restraint upon the use of certain property, or its refusal to do so, does not constitute an improper exercise of police power. It cannot be forced to impose restrictions upon the use of property and if the municipality does not see fit to act, as regards a particular property, no adjoining property owner can force it to do so.

Failure to do so might render invalid restrictions placed on the neighbors' property. But the neighbor has no right to *require* the municipality to restrict adjacent land in which he has no ownership.

Hence, the Appellees here have no right to demand that the municipality exercise its police power so as to prevent *Gregg* from using his property for the production of rock and gravel. The failure of the City to do so might invalidate the restrictions existing as to *Appellees'* property as being unreasonable under the circumstances, but that factor gives Appellees no vested right in the maintenance of restrictions on the *Gregg* property.

Pertinent here is the language of the Supreme Court of the United States in *Gully v. First National Bank*, 299 U. S. 108, 81 L. Ed. 70:

“The argument for respondent proceeds on the assumption that because permission at times is preliminary to action, the two are to be classed as one. But the assumption will not stand. A suit does not arise under a law renouncing a defense, though the result of the renunciation is an extension of the area of legislative power which will cause the suitor to prevail.”

But let us assume, without conceding, that the City Council did act unreasonably in granting the Gregg permit. That fact, if true, would not standing alone raise a Federal question. That would be a matter of State cognizance only. In order to constitute a Federal question it would be necessary to establish that the alleged unreasonable act resulted in depriving the Appellees of some property right without due process of law in contravention of the Fourteenth Amendment.

(b) Does the complaint state facts which would be sufficient to sustain a finding that the plaintiff's (Appellees herein) have or possess property rights which are taken from them by the granting of the permit to Gregg?

To sustain such a proposition it would be necessary as a matter of law to hold that every property owner has a vested right, a property right, in the perpetual maintenance in *status quo* by the municipality of the zoning regulations on his neighbors' property. This is untenable.

The theory of vested rights as respects zoning or re-zoning relates only to such rights as the owner of property may possess not to have his *own* property re-zoned so as to prohibit a particular use, after he has commenced the operation of the use of his *own* property pursuant to a prior zoning regulation.

This well established principle does not give Appellees any vested or property right to prevent the use by *other* owners of *their* property for such purposes as may be legally permissible. It does not give Appellees any vested or property right in the continuance or imposition of zoning regulations on Gregg's property so as to prevent or preclude the use by him of his *own* property for a

purpose lawful in itself and inherent in his ownership of said property.

This has been universally recognized by the Courts of practically every jurisdiction. Thus, in *Reichelderfer v. Quinn*, 287 U. S. 315, 77 L. Ed. 331, 53 Sup. St. 177, the owners of residential property in the District of Columbia sought to enjoin the District Commissioners from erecting a fire house near their own residential properties, upon the grounds that the statute authorizing the construction of the fire house at that point was inconsistent with regulations under the Zoning Act for the District of Columbia, in that the structure was to be erected in an area theretofore designated as a park. It was conceded that the presence of such a structure would diminish the attractiveness of adjoining residential property and in consequence decrease its value.

It was contended that the adjoining property owners had a valuable right appurtenant to their land, in the nature of an easement, to have the adjoining land used for park purposes, and that the Act of Congress, directing its use for other purposes, constituted a taking of their property without due process of law and without just compensation. The Court rejected this contention.**

It is interesting to note that the contentions made by the respondents in the *Reichelderfer* case are substantially the same as in the case at bar. In the case at bar Appellees contend that because their land is, and Appellant's land had, at one time been zoned for residential use, that such zoning created a higher value for their,

**Quotations from this and other authorities cited will be found under appropriate titles in the Appendix.

Appellees', property Further, that the change in zoning which arose by virtue of the conditional use permit granted to Gregg caused this artificially enhanced value to be diminished. Hence, they argue, their property has been taken without due process of law and without just compensation. We submit that this theory and contention is thoroughly discredited by the decision of the United States Supreme Court just cited.

See also (in Appendix):

Clifton Hills Realty Co. v. Cincinnati, 60 Ohio App. 443, 21 N. E. (2d) 993;

Eggeben v. Sonnenberg (Wisconsin), 1 N. W. (2d) 84;

Marblehead Land Company v. Los Angeles, 36 F. (2d) 242, 47 F. (2d) 528 (C. C. A. 9, certiorari denied, 284 U. S. 634, 76 L. Ed. 540;

Chayt v. Maryland Jockey Club (Md. Sup. Ct.), 18 A. (2d) 856;

People ex rel Miller v. Gill, 389 Ill. 394, 59 N. E. (2d) 671.

As already stated, the only instance in which the doctrine of vested rights may be invoked is where a property owner in reliance upon the zoning ordinance has erected a building or commenced a use on his *own* property prior to the change in zone. He has no vested right in the maintenance of the zoning ordinance with regard to other persons' property. This principle was recognized by the Supreme Court of California in *Jardine v. City of Pasadena*, 199 Cal. 64 at 74, where the Court said:

“There can be no question but that a municipality has the right to amend its zoning ordinance from time

to time as new and changing conditions warrant and require such revision.”

The Court held in the *Jardine* case that it was immaterial if the consequence of such rezoning was that the value of the surrounding land for residential purposes might be depreciated. It held that such possibility did not deprive the municipality of the exercise of its police power.

In *Hollearn v. Silverman*, 338 Pa. 345, 12 A. (2d) 292, an action was brought by property owners to restrain an adjoining property owner and the officers of a municipality from changing, by an amendment to the zoning ordinance, the classification of the defendant property owners' property from residential to commercial. In sustaining a demurrer, the Court said:

“The prayer of the bill is to restrain enforcement of the ordinance of 1939, which neither prohibits plaintiffs from doing, nor requires them to do anything on their respective properties. They enjoy these as they did before. Their contention is that if the defendant property owner is permitted to conduct stores, the fact that he may do so will result in depreciation of the value of their property. If it does, the result is *damnum absque injuria*. The original zoning ordinance . . . gave plaintiffs no vested right which would prevent the city from subsequently amending the ordinance by adding (additional property) to the commercial zone. The power to amend the zoning ordinance was expressly conferred by the legislature. The ordinance of 1933 fixing the boundaries of the zones did not result in a contract with plaintiffs preventing the city from

subsequently changing the boundaries if the city found it desirable to change them.”

See also:

Miller v. Board of Public Works, 195 Cal. 477;

Zahn v. Board of Public Works, 195 Cal. 497 at 512.

It is quite clear from the decisions that a municipality is not estopped to invoke its police powers by reason of the prior enactment of other zoning ordinances or because of private contractual restrictions in the use of property.

In the case of *Acker v. Baldwin*, 18 Cal. (2d) 341 at 345, the Court states:

“. . . The police power is not subject to the mental state of realtors who lay out a subdivision. Nor may the police power be limited by private contract. Thus it has been held that a city and county may not be estopped by its conduct from requiring the removal of a cemetery, estoppel being no stronger than a contract entered into by the sovereign.”

Again in *Otis v. City of Los Angeles*, 52 Cal. App. (2d) 605 at 613, the Court states:

“Even though we concede that the zoning of appellant’s property for residence purposes only, depreciated its value, that fact is not of controlling significance. As was said in the case of *Zahn v. Board of Public Works*, 195 Cal. 497 ‘Every exercise of the police power is apt to affect adversely the property

interest of somebody.' It was not a denial of plaintiffs' constitutional right to the equal protection of the laws for the City of Los Angeles to discriminate against plaintiffs by granting variances to some property owners and refusing a variance grant to plaintiffs in the same district."

But, Appellees allege, the granting of the permit to Gregg was arbitrary and unreasonable.

Arbitrary and unreasonable as to whom? Certainly not as to Gregg for he is not complaining. And if Appellees have no vested interest or property right in the maintenance of restrictive zoning on Gregg's property, which is well established as a matter of law, then they have no cause of action to complain as to arbitrary or unreasonable action affecting Gregg's property. See also *Hurley v. Commission of Fisheries*, 257 U. S. 223, 66 L. Ed. 206.

For the reasons stated, we respectfully submit that Appellees have failed to state a cause of action cognizable in the Federal Courts; that there has been no taking of Appellees' property without due process of law within the meaning of the Fourteenth Amendment. Hence, that the District Court abused its discretion in granting the preliminary injunction.

Our attention is directed to the fact that Appellees also allege a violation of the Fifth Amendment [Tr. Vol. I, p. 53]. Suffice to say that the Fifth Amendment does not pertain to State action.

II.

The District Court Has No Jurisdiction Because (A) No Diversity of Citizenship Is Shown; (B) No Federal Question Is Presented; (C) The Case does Not Arise Under the Constitution of the United States, or Under a Federal Statute; (D) The Granting of the Permit to Gregg Does Not Constitute an Unconstitutional Taking of Property Without Just Compensation; (E) The Granting of the Permit to Gregg Does Not Constitute a Denial to Appellees of Due Process of Law; and (F) The Alleged Controversy Is Not a Genuine and Present One Under the Constitution of the United States, But Is Merely Conjectural.—2 to 7 inclusive.

It is apparent that the complaint does not set forth any allegations to establish a diversity of citizenship. It is also evident that no Federal statute is involved. Therefore, the jurisdiction of the District Court exists only if the complaint states *facts* sufficient to sustain a finding that the granting of the Gregg permit is in violation of the Fourteenth Amendment.

The Fourteenth Amendment has generally been applied as a limitation on the police power of the States. Thus, when applied to zoning, the Supreme Court of California in the recent case of *Wilkins v. City of San Bernardino*, 29 Cal. (2d) 332, 340, made the following classification of the cases in which zoning ordinances have been held to violate the constitutional limitations as being unreasonable when applied to particular property:

- “1. Where the zoning ordinance attempts to exclude and prohibit existing and established uses or businesses that are not nuisances.
2. Where the restrictions create a monopoly.

3. Where the use of adjacent property renders the land entirely unsuited to, or unusable for, the only purpose permitted by the ordinance.
4. Where a small parcel is restricted and given less rights than the surrounding property, as where a lot in the center of a business or commercial district is limited to use for residential purposes, thereby creating an 'island' in the middle of a larger area devoted to other uses."

If the zoning regulation complained of does not fall within one of these four categories it is not unreasonable or arbitrary and hence not unconstitutional. Therefore, unless the Gregg permit comes within one of the four classifications set forth above, there is no violation of the Fourteenth Amendment and no Federal question is involved which would give the District Court jurisdiction to grant the preliminary injunction.

Let us examine the record in this case with reference to these well established principles.

1. There is no allegation or evidence that the effect of the Gregg permit is to *prohibit or exclude* established uses, or businesses.

2. There is no allegation or evidence that the effect of the Gregg permit is to create a monopoly, unless such can be inferred from the allegations of paragraph XXXIX of the complaint [Tr. Vol. I, p. 54] that "the real purpose of the eleven members of the City Council of said defendant city . . . was for the purpose of preferring said John D. Gregg as against all other property owners within said 'community' area, in the use and enjoyment of their properties within said area" and the most that can be said of that allegation is that it is an attempt

to allege a violation of Article I, Section 21 of the Constitution of the State of California, which provides in part:

“Nor shall any citizen or class of citizens be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.”

A violation of the State Constitution is for the State Courts to adjudicate and raises no Federal question.

Furthermore, if it be contended that the allegation raises an issue under the equal protection clause of the Fourteenth Amendment, we submit that it is insufficient because in order to raise the question of the constitutionality of a statute or ordinance alleged to be discriminatory in its nature or operation, and therefore to deny the equal protection of the law, the party complaining must show that he is a person or a member of a class of persons actually or presently aggrieved. If a person does not belong to a class discriminated against, he cannot complain of alleged discrimination. If one would assail a law as being unconstitutional and a denial of equal protection, he must allege and prove the facts which clearly show that the features of the law complained of *necessarily* operate to deprive him of some constitutional right or the enjoyment of some constitutional privilege.

In the recent case of *Queenside Hills Realty Co., Inc., v. Saal* (1946), 328 U. S. 80, 90 L. Ed. 1096, a law of New York required that non-fireproof lodging houses existing *prior* to the enactment of the law should comply with certain requirements including the installation of automatic sprinkling systems. It was contended that the law violated the equal protection clause in that it was applicable to lodging houses “existing” prior to the 1944

law but not to identical structures erected thereafter. The Court refused to recognize this contention. (See Appendix.)

Applying these principles to the case at bar we find that the Zoning Ordinance provides [Tr. Vol. I, p. 162] that the Planning Commission after public hearing may permit the development of natural resources in zones from which such uses are otherwise prohibited, provided such uses are deemed essential or desirable to the public convenience or welfare. It also provides [Tr. Vol. I, p. 165] for an appeal to the City Council by any person aggrieved by a decision of the Commission.

There is no allegation in the complaint and no evidence that any of Appellees have ever applied to the Commission for a conditional use permit. It obviously follows that they have not been discriminated against because they have never sought to obtain a permit which they, in common with all other citizens, are entitled to seek under the terms of the Ordinance. If they had applied for and had been refused a permit, while Gregg had been granted a permit, then they could possibly enjoin the enforcement of restrictive zoning against their *own* property, but that would not give rise to a cause of action against Gregg to enjoin him from acting under his *own* permit on his *own* land.

This is not merely an academic discussion of abstract principles of law. It has been applied by our Courts time and time again to specific factual situations.

In the case of *People v. Globe Grain & Milling Co.*, 211 Cal. 121, a statute had been enacted by the legislature prohibiting the taking of sardines for reduction purposes unless and until a permit therefor had been granted by the Fish and Game Commission. The statute further

provided that the Commission could grant revocable permits in such amount and to such persons as it determined, providing that it appeared to the satisfaction of the Commission that such use of sardines would not result in waste or depletion of the species. It was contended that this statute was unconstitutional in that it granted to the Commission an uncontrolled discretion and permitted discrimination between applicants. It appeared that the party attacking such Act as unconstitutional had not applied for and had not been denied a permit. The Court held that such non-applying person was not a person nor a member of a class of persons discriminated against and was therefore not entitled to question the constitutionality of the statute. (See Appendix.)

This same principle was enunciated by the United States Supreme Court, in the case of *Monongahela Bridge v. United States*, 216 U. S. 177, 195; 54 L. Ed. 435, in which case the Court held that speculation to the effect that a statute might be administered in a discriminatory manner was not sufficient to entitle plaintiff to attack the statute until plaintiff had actually been discriminated against.

See also:

United States v. Superior Court, 19 Cal. (2d) 189
at 197;

Ritz v. Lightston, 10 Cal. App. 685.

Applying the constitutional provision and the decisions to the allegations of the complaint in the case at bar, it becomes obvious that plaintiffs have utterly failed to allege facts sufficient to attack the constitutionality of

Section 12.24 of Ordinance 90,500 or of the act of the City Council in granting defendant Gregg his Conditional Use Permit as being discriminatory or denying equal protection of the laws. The plain language of the ordinance permits any person at any time to apply for a Conditional Use Permit to develop on his property any natural resource or any other permissible use. It is well settled that the mere speculation that if they did so apply they might be denied a permit is insufficient to entitle these plaintiffs to question the constitutionality of Section 12.24 or to attack the act of the City Council. We therefore respectfully submit that the complaint is wholly deficient in this regard.

3. The third category defined by the California Supreme Court is:

“3. Where the use of adjacent property renders the land entirely unsuited to or unusable for the only purpose permitted by the ordinance.”

This classification clearly has no significance in the case at bar, for it refers to restrictions placed upon the property of the aggrieved person and while it would entitle him to enjoin the enforcement of such restrictions as to his *own* property, it would not entitle him to enjoin the use of his neighbor's property unless the operation constituted a nuisance, which would be a State and not a Federal question.

4. The fourth category above referred to obviously has no application to the instant case.

There is another reason why no Federal question is involved in this case.

The complaint in paragraph XXII [Tr. Vol. I, p. 33] alleges:

“That the conduct of the eleven members of said City Council at the session of said City Council whereat said appeal of said defendant John D. Gregg was considered, and said variance permit was granted, and who controlled the deliberations and action of said City Council in respect of said matter, was arbitrary, unreasonable, unfair *and in excess of the limits of their authority.*” (Italics added.)

It follows that if the action of the City Council in directing the issuance of the permit was, as alleged, “in excess of the limits of their authority,” then their purported action was no action at all, and this under the State law, regardless of the provisions of the Fourteenth Amendment to the Constitution of the United States. Hence, such action was not State action, but the unauthorized action of certain individuals.

Innumerable cases have held, and it is beyond question, that the Fourteenth Amendment applies only to State action or to the action of a subdivision or agency of the State, including municipalities, or to the action of officials of a State or its subdivisions, where they are authorized by law to act. The Fourteenth Amendment has no application to acts of individuals.

For example, if an official is authorized by law to administer a certain law and in so doing he acts un-

reasonably, then that is State action which comes within the purview of the Fourteenth Amendment. But if he acts without any authority at all, such act is not the act of the State—it is the act of the individual and not within the scope of the Fourteenth Amendment.

Consider the allegation of the complaint that the Councilmen acted “in excess of the limits of their authority.” He who so acts necessarily acts with no authority whatever, for when he goes beyond the limits he leaves his authority behind him. He immediately becomes amenable to State law and the State Courts for his unlawful individual act, but that act without authority is not the act of the State as contemplated by the Fourteenth Amendment.

See (for quotations refer to Appendix):

Mayor etc. of City of Savannah v. Holst (C. C. A. 5), 132 Fed. 901.

Also:

Snowden v. Hughes (C. C. A. 7), 132 F. (2d) 476;

Swank v. Patterson (C. C. A. 9, 1943), 139 F. (2d) 145;

American Federation of Labor v. Watson, 327 U. S. 582, 90 L. Ed. 873 (1946);

Armour & Company v. City of Dallas, 255 U. S. 280, 65 L. Ed. 635;

Jones v. Oklahoma City (C. C. A. 10, 1935), 78 F. (2d) 860;

Harness v. City of Inglewood (D. C., D. Colo., 1936), 15 Fed. Supp. 140 at 143-4;

Missouri Utilities Co. v. City of California (D. C., W. D. Mo., 1934), 8 Fed. Supp. 454.

In our case, it is alleged that the act was in “excess of the limits of their (the City Council’s) authority.” Assuming, but not conceding, this allegation to be true, such act in effect is alleged to be in violation of the City Charter which is the source of all authority for the municipality of Los Angeles. The City Charter having been enacted as an Act of the State Legislature, a violation of it is a clear violation of State law. This being so, the allegedly *unlawful* and *unauthorized* act of the Councilmen was not the act of the State so as to bring it within the scope of the Fourteenth Amendment.

If, as Appellees allege in their complaint [Tr. Vol. I, p. 53], Gregg is acting under a void permit, then that permit is no permit at all, and certainly whatever Gregg is doing, he is doing as an individual. It is alleged in the complaint that what Gregg intends *to do* will interfere with the comfortable enjoyment by Appellees of their respective properties. Certainly this is not a cause of action which would come within the purview of the Fourteenth Amendment. Hence no Federal question is here involved.

Owensboro Water Works Co. v. Owensboro, 200 U. S. 38, 50 L. Ed. 351 (see Appendix);

Defiance Water Company v. Defiance, 191 U. S. 184 (see Appendix).

III.

The Alleged Cause of Action Is Essentially One to Enjoin the Commission of an Alleged Nuisance by Gregg and, There Being No Diversity of Citizenship, Is Solely Within the Jurisdiction of the State Courts.—8.

Insofar as Gregg is concerned the Appellees are plainly seeking to enjoin him from operating his property on the theory that such operation is an anticipated nuisance. This is evident from the allegations of the complaint, paragraphs XXVI, XXVII, XXVIII, XXIX and XXXVI. [Tr. Vol. I, pp. 36, 37, 38, 51.]

There being no diversity of citizenship, a cause of action for the abatement of a nuisance is not a Federal question. The aggrieved persons have an adequate remedy by recourse to the State courts.

If it be argued that the existence of a nuisance would deprive Appellees of property without due process of law, and that therefore a Federal question is raised, such argument is manifestly unsound. If such a nuisance did exist, it would be the result of individual action by Gregg and not State action as contemplated by the Fourteenth Amendment. The nuisance, if it did exist, *would not arise from the granting of the permit to Gregg*. It would arise from the act of an individual in the methods employed by the individual in the operations to be conducted on the subject property.

This is necessarily so, because the business of excavating for rock and gravel from lands belonging to an individual is not a nuisance *per se*, but is a lawful and useful occupation. Therefore, it cannot be said that the City Council by *its* act granted Gregg a permit to commit a

nuisance and that hence the alleged nuisance is the act of a State agency.

To further illustrate the point that the City Council in granting the Gregg permit is not vulnerable to the charge that its act constituted the granting of a permit to commit a nuisance, the rule of law is that whenever it is sought to enjoin an anticipated nuisance, as distinguished from an existing nuisance, it must be shown (a) that the proposed operation or use to be made of the property will *necessarily* be a nuisance *per se*, or (b) that while it may not amount to a nuisance *per se*, nevertheless, under the circumstances of the case, a nuisance must *necessarily* result from the contemplated act. The injury must be actually threatened, not merely anticipated; it must be practically certain, not merely probable.

This principle of law is very aptly stated by the Supreme Court of Pennsylvania in the case of *Pennsylvania Company v. Sun Company*, 290 Pa. 404, 138 Atl. 909. In that case it was alleged that the defendant intended to erect upon adjoining property large tanks for the storage of 150,000 gallons of oil and its by-products. It was alleged that the maintenance of these tanks would constitute a nuisance and a petition was filed for an injunction to prohibit such alleged anticipated nuisance. The Court refused to enjoin the erection of said tanks, because it was not shown that a nuisance would *necessarily* result from the intended use. (For quotation see Appendix.)

In *People v. Hawley*, 207 Cal. 395, there was a claim that the operation of a gravel pit in the Arroyo Seco constituted a nuisance by reason of the smoke, noise and

dust created by a steam shovel engaged in excavation, and stagnant pools of water which gathered in the excavation, and the danger of erosion to surrounding property. The Court refused to prohibit the conduct of the business and instead ordered that the stagnant water be drained off and disposed of and the depressions wherein the water had gathered be filled up and made the future operations of the company dependent upon compliance with said requirements and the substitution of an electric for a steam shovel and required that the excavations be kept sprinkled to avoid dust and that adequate protection be given to adjoining property to prevent erosion. Upon these conditions the Court allowed the company to continue its operations. It is significant to note that these conditions are very similar to the conditions prescribed by the Conditional Use Permit in the case at bar.

As further establishing the fact that the act of the City Council cannot be construed as the granting to Gregg of a permit to create a nuisance, and thereby be construed as bringing the alleged anticipated nuisance within the cognizance of the Fourteenth Amendment as being State action, let us consider the terms of the conditional use permit itself. [Tr. Vol. I, pp. 30, 282, 283.] The permit provides:

- “1. That the applicant construct a 6-foot cyclone type mesh wire fence around the said property, including barbed wire on the top of said fence providing the Fire Department grants permission for same.

- “2. That no permanent plant building or structure be installed or maintained on said property and that all material excavated be mined by an electrically powered shovel and primary crusher and transported by a conveyor belt system running through a tunnel or tunnels under Glenoaks Boulevard to the plant now owned and operated by applicant, lying southwesterly of said boulevard and processed at said plant.
- “3. That a setback line of fifty feet from all property lines and existing streets be maintained and that slopes of excavations be maintained at one foot to one foot.
- “4. That the area between all property lines or street line and 50 foot setback be screen planted progressively as excavated.”

These terms were obviously designed to prevent the operations from becoming a nuisance. In addition, the record shows that Hon. Alfred L. Bartlett, Judge of the Superior Court who tried the identical issues in the State Court case, by the judgment entered therein imposed certain additional conditions designed to prevent the creation or maintenance of a nuisance [Tr. Vol. II, pp. 460, 461], as follows:

- “1. That defendant John D. Gregg shall not conduct any operation for the excavation of rock, sand or gravel from the so-called ‘Critical’ area, as described in the complaint herein lying northeasterly of Glenoaks Boulevard, at any time before 6:00 o’clock a. m. of any day or after 8:00 o’clock p. m. of any day, excepting that the said defendant John D. Gregg shall not be prohibited from making any reasonable or necessary repairs to equipment in said area during other hours.

- “2. That said defendant John D. Gregg house in any primary crusher which is operated in that portion of the so-called ‘Critical’ area lying north-easterly of Glenoaks Boulevard so as to minimize any noise emanating therefrom.
- “3. That in connection with any and all drag-line operations on the banks or slopes of any pit excavated by defendant John D. Gregg in that part of the so-called ‘Critical’ area lying north-easterly of Glenoaks Boulevard, that the said defendant John D. Gregg shall cause the banks or slopes of said excavation to be sprinkled with water prior to any such drag-line operations so as to minimize the possibility of dust from any such operation being carried by the winds beyond the outer boundaries of said so-called ‘Critical’ area.
- “4. That said defendant John D. Gregg, as soon as is reasonably practicable and as soon as material and equipment is available, shall complete the construction of the dust collection system in his rock crusher plant located southwesterly of Glenoaks Boulevard, the construction of which system was commenced prior to the commencement of this action.”

Gregg’s affidavit [Tr. Vol. I, pp. 283, 284] shows that he has complied with these conditions. All of these matters were before the District Court. Appellant respectfully urges that in the light of all these circumstances and facts it was error for the District Court to issue a preliminary injunction herein.

IV.

Even if a Federal Question Were Involved, the Court Erred in Granting the Preliminary Injunction Absolutely Enjoining and Restraining Gregg From Excavating or Conducting Any Other Operation for the Production of Rock, Sand or Gravel Within or Upon His Property Because Where the Operation of a Business Is Not a Nuisance Per Se, a Decree Should Not Enjoin More Than the Specific Things That Constitute the Nuisance, and Should Never Go Beyond the Requirements of the Particular Case.—9.

Pomeroy's Equity Jurisprudence, 2d Ed., Vol. 5, Secs. 1945, 1948 (see Appendix);

Judson v. Los Angeles Suburban Gas Company, 157 Cal. 168.

We submit that even if a Federal question were involved in this case, nevertheless the District Court went beyond the bounds of propriety in granting a preliminary injunction *absolutely* prohibiting the Gregg operation.

No interlocutory injunctive relief should have been granted in any event, beyond that which might be deemed necessary to prevent the occurrence of those things of which Appellees complain, to-wit, noise and dust alleged to emanate from the operation, injury to the aesthetic sense and possible erosion. Incidentally all these possibilities are adequately provided against by the terms of the Gregg permit and the judgment in the prior State suit.

As was stated in the case of *People v. Hawley*, 207 Cal. 395, *supra*, the business of excavating rock and gravel by the owner from lands belonging to him is a lawful, necessary, and useful occupation, and the regu-

lation thereof should go no further than to control those particular features of the operation which might be objectionable to others. In the *Hawley* case the Court held that the excavating operations could not be prohibited *in toto* and that so long as the defendant complied with the order of the Court by substituting an electric for a steam shovel and by keeping the excavations sprinkled to avoid dust, and by preventing the collection of stagnant water, the excavating operations might continue. (For quotation see Appendix.)

The case of *In re Smith*, 143 Cal. 368, involved an attempt to prohibit the operation of a gas plant. In holding that the ordinance prohibiting its operation was void, the Court states:

“It will not be disputed that the business here sought to be prohibited is not only legitimate and useful, but even necessary, to our present civilization. Moreover, under the very terms of our constitution, it is a recognized lawful occupation. (Const. Cal., art. XI, sec. 19.) The county of Los Angeles, therefore, has no power to prohibit the manufacture of gas, though it may, in the legitimate exercise of its powers, regulate its manufacture and the places thereof.”

The case of *In re Kelso*, 147 Cal. 609, involved an ordinance absolutely prohibiting the operation of a stone quarry in the city of San Francisco. The Court held the ordinance to be void and in so holding stated as follows:

“We can see no valid objection to the work of removing from one’s own land valuable deposits of rock or stone that may not be entirely met by regulations as to the manner in which such work shall be

done, and this being so, we are satisfied that an absolute prohibition of such removal under all circumstances cannot be upheld.”

In the case of *In re Throop*, 169 Cal. 93, there was an ordinance adopted by the city of South Pasadena prohibiting the maintenance of a stone crusher in a certain portion of the city. The Court held the ordinance void in the following language:

“The unreasonable restrictions as to the place where a stone crusher may or may not be erected or maintained render the ordinances void.

“Concrete has become a very important factor in the construction of improvements in our cities and towns and in the construction of roads and highways. Rock, sand, gravel, and cement are necessary ingredients in concrete construction and must be obtained. The business of producing these materials, if maintainable within the confines of a city or county without becoming a public nuisance or offensive to the health, comfort, safety, or welfare of the inhabitants, cannot by legislative bodies be arbitrarily suppressed or interfered with.

“The city of South Pasadena in the exercise of the police power vested in it by our state constitution has the undoubted right to regulate the business of operating a stone crusher within the city limits, but such ordinance must be reasonable and must be for the purpose of protecting the public health, comfort, safety, or welfare. As stated by the supreme court

of the United States in *Dobbins v. Los Angeles*, 195 U. S. 223, (49 L. Ed. 169, 25 Sup. Ct. Rep. 18), 'It may be admitted that every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety and that it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community.' ”

In the case of *Byers v. Colonial Irrigation Company*, 134 Cal. 553, an action was commenced to abate the maintenance of a dam constructed by a defendant on the grounds that it constituted a nuisance and interfered with plaintiff's water rights. The Court refused to order the removal of the dam but issued an injunction enjoining the defendant from maintaining and using the dam in such manner as to obstruct the flow to plaintiff's lands of water to which plaintiff was found to be entitled and from maintaining and using the dam so as to interfere with the rights of the plaintiff as determined and defined by the findings and the judgment. In commenting upon the form of the injunction the Court made the following statement:

“As to the former point, it is not found that the dam is a nuisance in itself, but only that it is a nuisance as it had been used, and the court would not have been justified in directing its total abatement or removal. In such cases a 'total destruction

of the property should not be decreed.' It is sufficient that the party be enjoined from using the structure complained of in such a manner as to make it a nuisance. (Fresno v. Fresno Canal etc. Co., 98 Cal. 183, 184; McMenemy v. Baud, 87 Cal. 134; Lorenz v. Waldron, 96 Cal. 249.)”

In *McMenemy v. Baud*, 87 Cal. 134, plaintiff and defendant owned adjoining property. Plaintiff resided with his family on his property while defendant resided with his family on his property. Defendant, however, operated a small brass factory on the ground floor of his house. The space between the two houses was only 5 or 6 inches. Plaintiff brought this action for damages and injunction against the operation of the foundry, claiming that the same constituted a nuisance. The trial court enjoined the operation of the foundry. On appeal the Supreme Court reversed the judgment and remanded the cause for a new trial holding that the nuisance could be abated by controlling the method of operation and it was, therefore, improper to issue a prohibitive injunction as to the entire operation. (For quotation see Appendix.)

In 39 Am. Jur. 443-446, we find an interesting statement on this subject. Likewise in 43 Corpus Juris Secundum 934-935. And in 20 Cal. Jur. 329-330.

In *McPheeters v. McMahan*, 131 Cal. App. 418, an injunction was sought against the operation of a dance hall on the grounds that it disturbed the peace and comfort of nearby residents. The trial court granted an injunction and on appeal the judgment was reversed on

the ground that the injunction was improper in that it restrained the operation of a lawful business rather than merely restraining the specific things which were objectionable. The Court stated:

“It is evident from the nature of the business here involved that it may be carried on without annoyance. . . . The rule applicable in such cases, and where appropriate facts are alleged and proven, is that a court of equity will not enjoin the conduct of the defendants entire business, where such business is not a nuisance *per se*, if a less measure of restriction will afford the plaintiff the relief to which he may be entitled.” (Citing *Vowinckel v. Clark & Sons*, 216 Cal. 156; *McMenomy v. Baud*, 87 Cal. 134; *Williams v. Blue Bird Laundry Co.*, 85 Cal. App. 388.)

To the same effect is the case of *Thompson v. Kraft Cheese Co.*, 210 Cal. 171.

The case of *Vowinckel v. Clark & Sons*, 216 Cal. 156, was an appeal from a judgment for plaintiff in an action to enjoin defendant's operation of its factory unless and until it should make certain changes to prevent injury to a neighbor. Defendant for many years had operated a sewer-pipe and tile manufacturing factory in the city of Alameda, in a district which was partly industrial and partly residential. Plaintiff resided on the neighboring property and complained regarding injuries to the peaceful enjoyment of the premises by reason of soot, smoke and noise emanating from the adjoining factory. The

judgment decreed that defendant be enjoined from operating the factory unless and until he comply with certain specified conditions which were designed to eliminate the smoke and noise. Defendant appealed, and the Supreme Court in affirming the judgment stated:

“In the present case the court appears to have given due consideration to the situation of defendant. This is apparent from the fact that it refused to abate entirely the defendant’s operations and granted relief sought to the extent necessary to preserve the rights of both parties. In other words, the court in the exercise of equity powers has compared consequences and has considered the injuries resulting to each party, on the one hand if the injunction be wholly denied, on the other if it be granted. The court, from the evidence presented, gave heed to the rule that in a proper case it will not enjoin the conduct of the defendant’s entire business, where such business is not a nuisance *per se*, if less measure of restriction will afford the plaintiff the relief to which he may be entitled.” (Citing several cases.)

We respectfully submit that regardless of whether or not a Federal question exists, the Court exceeded the bounds of propriety in issuing an interlocutory decree enjoining all operations on the Gregg property, unless a \$50,000 bond was posted to insure refilling of the pit should judgment ultimately go against appellant. If any preliminary injunction were proper, it should have been strictly limited in accordance with the authorities cited.

V.

There Can Be and as a Matter of Law Is No Estoppel
With Reference to the Granting of the Permit to
Gregg.—10.

Appellees have devoted a large part of their complaint herein in attempting to develop a rather vague and obscure theory of estoppel. Many pages of the complaint are devoted to allegations of matters of inducement leading up to the allegation (which is only a conclusion of law) that Gregg is estopped to operate under the permit and that the city is estopped to grant the permit. [Tr. Vol. I, pp. 7 to 27, incl.; p. 56.] In fact this complaint appears to contain as many diverse theories, none of them sound, as a false diamond has facets.

As stated in 19 American Jurisprudence, pages 601-603, estoppels are of three kinds, (1) by record, (2) by deed, and (3) by matter *in pais*:

“(1) An estoppel by record is the preclusion to deny the truth of matters set forth in a record, whether judicial or legislative, and also to deny the facts adjudicated by a court of competent jurisdiction.

“(2) An estoppel by deed is a bar which precludes one party to a deed and his privies from asserting as against the other party and his privies any right or title in derogation of the deed, or from denying the truth of any material facts asserted in it.

* * * * *

“To constitute an estoppel by deed, a distinct and precise assertion or admission of a fact is necessary. Hence, an estoppel by deed or similar instrument can arise only where a party has conveyed a precise or

definite legal estate or right by a solemn assurance which he will not be permitted to vary or to deny. Such estoppel should be certain to every intent.

“(3) Equitable estoppel or estoppel *in pais* is the principle by which a party who knows or should know the truth is absolutely precluded, both at law and in equity, from denying, or asserting the contrary of, any material fact which, by his words or conduct, affirmative or negative, intentional or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words or conduct, to believe and act upon them, thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion were allowed.” (19 American Jurisprudence, p. 634.)

Estoppel by contract is similar to and governed by the same rules as estoppel by deed. Therefore we may limit our discussion on this subject to (a) technical estoppel (*i. e.*, estoppel by record, deed or contract), and (b) estoppel *in pais*, or equitable estoppel.

That there is no estoppel by deed, contract or record is too clear for argument, because

(A) There is no record, judicial or legislative, the truth of which either Gregg or the City seeks to deny; neither is there any inconsistent pleading by either of them;

(B) There is no deed or contract executed by either Gregg or the City with Appellees which would operate as an estoppel. Hence, the question, if any, relates to an estoppel *in pais*.

- (C) There is no estoppel *in pais*, because:
- (1) neither Gregg nor the City seeks to deny or assert the contrary of, any material fact;
 - (2) neither Gregg nor the City, by words or conduct, affirmative or negative, has, intentionally or through culpable negligence, induced plaintiffs, or any of them, to believe or act upon any of the words or conduct of Gregg or the City;
 - (3) none of the plaintiffs was excusably ignorant of the true facts;
 - (4) none of the plaintiffs had any right to rely on any words or conduct of either Gregg or the City;
 - (5) assuming, without conceding, that plaintiffs (without any justification, however) may have believed and acted upon some words or conduct of the City, none of them believed or acted upon any words or conduct of Gregg;
 - (6) none of the plaintiffs, as a consequence reasonably to be anticipated from any words or conduct of either Gregg or the City, changed his position in a way that he suffered, or will suffer, injury if such denial or contrary assertion be allowed.

In short, none of the elements of estoppel is present as against Gregg, and at least all but one is absent as against the City.

As to Gregg, of course, there can be no estoppel. There is no fiduciary or contractual relationship or privity between Gregg and any of the Appellees out of which an equitable estoppel could arise.

In the case of *Estate of Hurley*, 28 Cal. App. (2d) 584, 590, the Court states:

“It seems to be the established law that an equitable estoppel cannot be asserted by one who is not a party to the contract, and further, that where a contract is entered into for the sole purpose of inducing or influencing the conduct of a third party who is a stranger to the contract, the doctrine of estoppel may not be invoked. (*Coffman v. Malone*, 98 Neb. 819, 154 N. W. 726; *Booth v. County of Los Angeles*, 124 Cal. App. 259, 12 Pac. 2d 72; *Creason v. Creason*, 123 Cal. App. 455, 11 Pac. 2d 451.) An equitable estoppel can only be invoked by a party to a transaction to whom the representation was made and who acted upon such representation to his injury.”

Obviously, the claim of estoppel as to Gregg is without foundation. Furthermore, it raises no Federal question as Gregg's acts were strictly the acts of an individual.

In *Davidow v. Lochman Bros.* (C. C. A. 9, 1935), 76 F. (2d) 186 at 187, the Court says:

“Under such circumstances, the allegations of the bill are insufficient to confer jurisdiction, for it is well settled, as said in *Kieman v. Multnomah County*, 95 Fed. 849, that: ‘The Fourteenth Amendment has reference exclusively to state action, and not to any

action by individuals. It is a prohibition upon the state to “make or enforce any law which will abridge the privileges or immunities of citizens of the United States,” or which will “deprive any person of life, liberty or property without due process of law.” It prohibits state legislation in violation of these rights. It does not refer to any action by private individuals. (*Virginia v. Rives*, 100 U. S. 313; *United States v. Cruikshank*, 92 U. S. 542; *Civil Rights Cases*, 109 U. S. 11), otherwise every invasion of the rights of one person by another would be cognizable in the Federal Courts under this amendment.”

See also:

Mason v. Hitchcock (C. C. A. 1, 1939), 108 F. (2d) 134;

Marten v. Holbrook, 157 Fed. 716.

With reference to an estoppel against the City of Los Angeles. Here, again, there is no Federal question involved. Whether or not the City is estopped to exercise its police power would seem to be clearly a matter solely within the jurisdiction of the State Courts.

But if, by means of some circuitous method of reasoning, Appellees have convinced themselves that such alleged estoppel has some relationship to the Fourteenth Amendment, then we submit that their contention is untenable.

No person has a vested right in the exercise of the police power and, hence, there can be no estoppel by

reason of prior zoning ordinances or private deed restrictions.

In attempting to develop a theory of estoppel, Appellees have alleged that this area was restricted to residential use by a declaration of restrictions executed and recorded in the year 1914. It is also alleged that these restrictions expired in 1934. [Tr. Vol. I, p. 10.] How can there be any estoppel against the City of Los Angeles based upon private deed restrictions which admittedly expired by their terms fourteen years ago? Do Appellees contend that restrictive covenants can by judicial fiat be extended beyond the express terms of the restrictions? Rather, it would seem that the very terms of the restrictions would have put a prudent person on notice as to the probable use of the land for other than residential purposes upon the expiration of the restrictions. This is particularly significant because it was in the year 1934, when the restrictions expired, that Gregg commenced his rock and gravel operations directly across Glenoaks Boulevard from the property in question. [Tr. Vol. I, pp. 274, 275.]

Furthermore, Appellees' contention in that regard has been discredited by the courts. In *O'Rourke v. Teeters*, 63 Cal. App. (2d) 349, 352, the Court says:

“Private agreements imposing restrictions are not to be considered when determining the validity of a zoning ordinance for the reason that such private agreements are immaterial.”

Appellees seek further to base a plea of estoppel upon the allegations that prior to the year 1946 the subject and surrounding land had been zoned for residential purposes, and that they purchased their properties in reliance upon a belief that the zoning would remain unchanged. Yet every person is presumed to know the law and to know that under the City Charter the municipality could amend or repeal the zoning ordinances and that the very ordinances relied upon by Appellees contained provisions for variances and exceptions from the restrictive terms thereof.

The theory of such an estoppel is basically unsound. If Appellees may establish an estoppel against the City of Los Angeles under the circumstances pleaded herein, which would prevent the City from changing the zoning of an area in any respect, then we submit that any property owner in any part of the City of Los Angeles, upon the same theory, could prevent any change of zone in the area of his property. If these Appellees may as a matter of constitutional right assert an estoppel against the City of Los Angeles by reason of the fact that they may have relied upon a belief that the residential zoning would forever remain unchanged and unvaried, then we submit that any resident of the City would, as a matter of law, be entitled to raise the same estoppel any time the municipality attempted to exercise its police power in zoning matters. One can imagine the chaotic condition which would result. Such a doctrine once established, might well result in "freezing" the entire comprehensive

zoning plan of the City of Los Angeles in the mold in which it was first cast and prevent any change when opposed by an organized minority such as we have in the case at bar.

If this be the law, then we submit that the City of Los Angeles, and through it the State of California, by its very act of adopting a zoning ordinance, has abdicated its sovereignty in the administration of the police powers of the municipality insofar as zoning regulations are concerned; and the man in the street has successfully usurped the police powers vested by the Constitution of the State of California and by the Los Angeles City Charter, in the municipal government.

But we are confident that this is not the law. For in order to be the law it must first be established that every person has a vested and constitutional right to the maintenance in status quo of the zoning regulations on his neighbors' property so as to preclude a change by governmental authority in the zoning of adjoining property. We have already demonstrated the fallacy of that contention and will not unduly extend this brief by again arguing the point. It suffices to refer to the arguments and citations of authority hereinabove set forth with relation to the question of vested property rights.

We cannot believe that such an unsound and dangerous theory will ever receive the sanction of the courts. For to so hold would be to strike at the very foundation of all governmental authority heretofore so consistently held to be inherent in the police power of the state.

VI.

The Wisdom or Expediency of Granting the Permit Was for the City Council to Decide, and Is Not Subject to Judicial Review and Does Not Present a Federal Question.—11.

There are allegations in the complaint calling in to question the wisdom and expediency of, and necessity for, the permit to Gregg, and seeking to impeach the motives of the Council. [Tr. Vol. I, pp. 33, 34, 54.] These allegations raise no Federal question so as to give jurisdiction to the Federal Court.

It is well established that in the exercise of legislative or judicial powers the motives of those exercising the power are entirely irrelevant and not to be considered in a determination of the validity of the exercise of the power.

A general presumption exists in favor of the good faith of all law-making bodies. The law presumes that the law-making body considers the effect of the legislation upon the constitutional rights of citizens, and that it acts from patriotic and just motives with the desire to promote the public good, and that laws are passed in good faith. In accordance with this principle, no presumption of wrongdoing on the part of any legislative body is ever indulged in by the judiciary. One of the doctrines definitely established in the law is that if a statute appears on its face to be constitutional and valid, the Court cannot inquire into the motives of the Legislature.

Lukens v. Nye, 156 Cal. 498;

In re Wong Wing, 167 Cal. 109;

La Tourette v. McMaster, 248 U. S. 465, 63 L. Ed. 362.

When the constitutionality of an act is made to depend upon the existence or non-existence of some fact or state of facts, the determination thereof is exclusively for the legislative body and the Courts will acquiesce in its decision without an examination of the motives of the legislative body.

In the case of *Universal Consolidated Oil Co. v. Byram*, 25 Cal. App. 353 at 371, the Court refused to annul an order fixing the assessed valuation of property. It was contended that the Board of Supervisors acting as a Board of Equalization, had acted with improper motives. In holding that such allegation was irrelevant and immaterial, the California Appellate Court quoted from *C. B. & Q. R.R. Co. v. Babcock*, 204 U. S. 585, 51 L. Ed. 636, as follows:

“When we turn to the evidence there is equal ground for criticism. The members of the Board were called, including the Governor of the state, and submitted to an elaborate cross examination of their minds in valuing and taxing the roads. This was wholly improper. In this respect the case does not differ from that of a jury or umpire, if we assume that the members of the Board were not entitled to the possible higher impugnties of a judge. . . . Jury men cannot be called, even on a motion for a new trial in the same case, to testify to the motives or influence that lead to their verdict, . . . so, as to arbitrators. . . . A similar reasoning was applied to a judge in *Fayerweather v. Ritch*, 195 U. S. 276. A multitude of cases will be found collected in *4 Wigmore on Evidence*, para. 2348, 2349. All the often repeated reasons for the rule as to jurymen apply with redoubled force to the attempt, by exhibiting on cross-examination the confusion

of the members' minds, to attack in another proceeding the judgment of a lay tribunal, which is intended, so far as may be, to be final, notwithstanding mistakes of fact or law."

In *People v. Central Pacific Railroad Co.*, 105 Cal. 576, the Court held that testimony concerning conversations between members of the State Board of Equalization while in session was properly excluded and that the intention of the Board or any of its members could not be shown in this manner and the evidence could not be used for impeachment purposes.

In the case of *In re Smith*, 143 Cal. 368, the Court held that in the legislative exercise of police power, the motives of the supervisors in adopting an ordinance were of no consequence and not to be considered in determining the validity of the ordinance.

As to the wisdom and expediency of or necessity for the permit, this is a matter which under the law was solely within the discretion of the City Council to determine.

The rock business is a lawful and legitimate business and does not constitute a nuisance *per se*. (*People v. Hazley*, 207 Cal. 395 at 412.) Upon this point we submit that the following language, as used by the Court, in *State v. Moore*, 91 N. H. 16 at 18, 13 A. (2d) 143 at 145, is applicable to the case at bar:

"If no one may engage in a legitimate business or occupation, unless there is a public need for him to do so, the loss of personal freedom is extreme. . . . The question is one of economic consideration but whatever the advance in the scope of the due exercise of the police power, the time has not yet come when it may be said that legislation may prohibit entrance into a legitimate field of activity for

the reason alone that sufficient in number are already engaged therein to meet the public demand for its product or service. Special reasons for enterprises such as railroads and public utilities may justify legislation of such a character. But no reasons of that kind exist as to the business here under consideration.”

The law is well settled that the Courts cannot, under the guise of exerting judicial power, usurp legislative functions by setting aside a statute or an order issued or made pursuant to a statute upon the ground that such power is unwisely or inexpediently exercised. This factor has been many times specifically repudiated as a possible basis for invalidating legislation. This judicial position has given rise to the oft repeated mandate that the Courts can have no concern as to the expediency or wisdom or necessity for the enactment of laws or for the making of administrative orders, pursuant to such legislation.

This is specifically held to be the law in the case of *Veterans Welfare Board v. Riley*, 189 Cal. 159; *Arizona v. California*, 283 U. S. 423, 75 L. Ed. 1154, and in a host of other cases of every jurisdiction in the United States, as cited in 11 American Jurisprudence, pp. 808-810.

In *Interstate Commerce Commission v. Chicago R. R. Co.*, 215 U. S. 479, 54 L. Ed. 291, it was contended that an order of the Interstate Commerce Commission made within the scope of the power delegated to such Commission by Congress was unwise and inexpedient and therefore should be set aside. The Supreme Court of the United States rejected this contention and again affirmed the long settled rule of law which has just been stated.

The discretion of the governing body is very broad in the exercise of the police power, both in determining what the interests of the public require and what measures and means are reasonably necessary for the protection of such interests. In fact, the Courts often state that within constitutional limits the legislative branch of the government is the sole judge as to what laws should be enacted for the welfare of the people and as to when and how the police power is to be exercised. This has been affirmed and reaffirmed in numerous cases, including *Pacific Coast Dairy v. Police Court*, 214 Cal. 668; *Miller v. Board of Public Works*, 195 Cal. 477; *In re Faro*, 178 Cal. 592; *Ex parte Dicky*, 144 Cal. 234.

All general principles relating to the presumptions of validity surrounding legislation and the duty of the Courts to uphold legislative action, apply with particular emphasis to exercises of the police power. Not only is the constitutionality of such measures presumed, but it must also be presumed by the Courts that the legislative body has carefully investigated and determined that the interests of the public require such legislation. It is the duty of the Courts to sustain police measures unless they are clearly, plainly and palpably in violation of the constitution. It is not enough that the case is a doubtful one; the act must be so clearly unreasonable that the Court can say that no fair-minded man can think it reasonable. The earnest conflict of serious opinion does not suffice to bring such act within range of judicial cognizance.

11 American Jurisprudence, 1089;

Erie Railway Co. v. Williams, 233 U. S. 685,
58 L. Ed. 1155;

State v. Hutchinson, 168 Ia. 1, affmd. 242 U. S.
153, 61 L. Ed. 217.

VII.

The District Court Should Have Declined to Take Jurisdiction Both Under the Provisions of Sec. 265 of the Judicial Code (28 U. S. C. A. 379) and Under the Doctrine of Comity.—12.

Prior to the commencement of this action, and on November 22, 1946, twenty-six persons, alleged to be the owners of property in the vicinity of Gregg's land, and acting in their own behalf and also on behalf of "all others similarly situated" [Tr. Vol. II, p. 369], commenced an action in the Superior Court of Los Angeles County against Gregg and the City of Los Angeles. The complaint in that action is substantially identical with the complaint in this action. It prays for the same identical relief. [Tr. Vol. II, pp. 319 to 380, incl.] It was prepared and filed by the same attorneys who appear for Appellees in this action. The issues raised by the complaint are identical with those raised herein including a claim of a violation of the Fourteenth Amendment of the United States.

After a trial before Hon. Alfred L. Bartlett, Judge of the Superior Court, lasting from May 28, 1947 until September 10, 1947, a judgment was entered in that case in favor of defendants Gregg and the City of Los Angeles and against the plaintiffs. [Tr. Vol. I, p. 287; Vol. II, pp. 458, 461, incl.] Every issue was found against the plaintiffs and in favor of defendants [Tr. Vol. II, pp. 404 to 457, incl.] including a specific finding that the granting of the permit was not in violation of either the Constitution of California or of the United States. [Tr. Vol. II, pp. 446, 447.] An appeal was taken by plaintiffs from that judgment [Tr. Vol. I, p. 287;

Vol. II, pp. 462, 463], which appeal is now pending before the Supreme Court of the State of California.

On November 14, 1947 this proceeding was commenced in the District Court. Although the plaintiffs *named* in this proceeding are different than those *named* in the State suit, nevertheless from what has been observed, it is apparent that the real parties in interest are identical in both suits, and as already stated the state action was a representative suit which included the plaintiffs named herein as represented parties. The intimate relationship between the plaintiffs in this suit and the plaintiffs in the State suit is further emphasized and made clear by the allegations contained in paragraph XXX of the complaint herein [Tr. Vol. I, pp. 40, 41, 42, 43 and 44] where in all of the plaintiffs in the State suit, although not made parties plaintiff herein, nevertheless are specifically named as owners of property in the vicinity of the Gregg land and are therefore, it is inferred, beneficially interested in this Federal suit. We submit that beyond peradventure these two suits are being concurrently prosecuted by the same parties in interest even though the *named* parties plaintiff appear to be different.

Therefore, it is appellant's position that the issuance by the District Court of a preliminary injunction restraining those very acts that the Superior Court of California refused to restrain is an unlawful interference with the process of the State Court in violation of Section 265 of the Judicial Code (28 U. S. C. A. 379); and further, that under the doctrine of comity the District Court should have declined jurisdiction.

It is well settled that the prohibition of Section 265 of the Judicial Code extends not only to orders of the Federal Courts directly restraining proceedings of the

State Court, but to all orders of the Federal Court which necessarily have that effect and also to injunctions directed against parties engaged in the proceedings in the State Courts.

In *Hill v. Martin*, 296 U. S. 393, 80 L. Ed. 293, the Court says:

“The prohibition of section 265 is against a stay of ‘proceedings in any court of a state.’ That term is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. It applies to appellate as well as to original proceedings; and is independent of the doctrine of *res adjudicata*. * * * And it governs a privy to the state court proceeding—like Elinor Dorrance Hill—as well as the parties of record. Thus, the prohibition applies whatever the nature of the proceeding, unless the case presents facts which bring it within one of the recognized exceptions to Section 265. It is not suggested that there is a basis here for any such exception.”

Amusement Syndicate Co. v. El Paso Land Improvement Co., 251 Fed. 345;

Cour D’Alene etc. Co. v. Spalding, 93 Fed. 280, certiorari denied 19 S. Ct. 884, 174 U. S. 801, 43 L. Ed. 1187;

Domestic & Foreign Missionary Soc. v. Hinman, 13 Fed. 161;

Whitney v. Wilder, 54 Fed. 554;

Hamilton v. Walsh, 23 Fed. 420;

N. Y. & N. E. Ry. Co. v. Woodworth, 42 Fed. 468;

Foster v. Abingdon Bank, 68 Fed. 723;

Chicago Trust Co. v. Bentz, 59 Fed. 645.

In the case of *Simpson v. Ward*, 80 Fed. 561, after the entry of an order in a State court dissolving a corporation and ordering the sale of its property, certain stockholders applied to the Federal court to restrain the sale on the ground that the State court was without jurisdiction and hence there was a denial of due process. The Federal court held that such injunction should not be granted.

In *Green v. Porter*, 123 Fed. 351, it was held that where a party obtained from a State court an injunction forbidding plaintiff in a patent infringement suit from assigning his claim, a counter injunction sought by plaintiff in a Federal court will be refused on account of the comity existing between Federal and State courts, and the confusion which would result from conflicting decrees.

And in *Carl Laemmle Music Co. v. Stern* (C. C. A.-2, 1914), 219 Fed. 534, it was held that inferior Federal courts have no power to enjoin proceedings in the State courts for supposed judicial error of their judges. Judicial error must be reviewed by the Federal courts on appeal.

It appears evident that if Appellees desired a review by the Federal courts of the issues already decided in the State suit, *which was a representative suit brought in their behalf*, the proper method would have been to intervene therein and prosecute an appeal in orderly judicial procedure through the Supreme Court of California and then to the United States Supreme Court on writ of error.

Furthermore, under the doctrine of comity, the District Court should have refused to exercise jurisdiction.

This action and that in the State court are both *quasi in rem*. They are in the nature of proceedings *in rem* to restrain and prevent the allegedly unlawful use of real

property. They are *in personam* only in the sense that Gregg is a necessary party to make the decree *in rem* effective.

In *Hill et al. v. United States* (Ct. App., D. C., 1930), 44 F. (2d) 889, the Court held that an action declaring two garages located in Washington, D. C., to be nuisances was a proceeding *in rem*. Citing *Grasfield v. United States*, 276 U. S. 494, 72 L. Ed. 670.

To the same effect are the decisions in:

Engler v. United States (C. C. A. 8), 25 F. (2d) 37;

State of Alabama etc. v. Guardian Realty Co. (Ala. Sup. Ct.), 186 So. 168;

Bradford v. Barbiene, 35 Cal. App. 770;

Foltz v. Gifford, 54 Cal. App. 183.

In *Title Restoration Co. v. Kerrigan*, 150 Cal. 289, the Court says:

“In any view the proceedings contemplated by the act is *quasi in rem*,—that is to say, the purpose of the proceeding is not to establish an ‘infinite personal liability’ against any defendant, but is merely to affect the interest of the defendant in specific real property within the state. . . .”

It has long been the established rule that under the doctrine of comity, one who has first invoked action by a State court in an action *in rem* or *quasi in rem*, may not later, when dissatisfied with the result, invoke the jurisdiction of the Federal court to try *de novo* the very issues decided adversely to him in the State court. To hold otherwise would result in endless litigation and confusion. There must sometime be an end to litigation.

The Court in *In re Lasserat* (C. C. A. 9, 1917), 240 Fed 325 at 326, says:

“The petition for mandamus must be denied. It is the general rule that, when suits are brought in courts of concurrent jurisdiction involving the same controversy and between the same parties, the court in which the suit was first instituted is entitled to the exclusive jurisdiction to determine the controversy. In *Smith v. McIver*, 9 Wheat. 532, 6 L. Ed. 152, Chief Justice Marshall said:

‘We think the cause must be decided by the tribunal which first obtains possession of it, and that each court must respect the judgment or decree of the other.’

“In *Taylor v. Taintor*, 16 Wall. 366, 370, 21 L. Ed. 287, the court said:

‘Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted.’ ”

In *People’s Gaslight & Coke Co. v. Chicago*, 192 Fed. 398, the city had previously instituted a suit in a State court to enforce an ordinance fixing the price of gas, after which the complainant instituted its suit in the Federal court to restrain enforcement of the ordinance on the ground that its enforcement would deprive complainant of its property without due process of law. It was held that complainant’s suit was not *in personam*, and hence the State court having first acquired jurisdiction and having full powers to adjudicate the rights of the parties, complainant was not entitled to such an injunction, such injunction being prohibited by Section 720, U. S. Revised

Statutes (that section being now embodied in Section 265 of the Judicial Code).

In *Orton v. Smith*, 59 U. S. (18 How.) 263, 15 L. Ed. 393, it was held that the Federal court could not take jurisdiction of a bill for an injunction to quiet title to an estate, where the title was already in litigation in a court of concurrent jurisdiction.

In *Blackmore v. Public Service Com.* (D. C., Pa.), 12 F. (2d) 752, appeal dismissed 299 U. S. 617, 81 L. Ed. 455, the Court says:

“The jurisdiction of the superior court of Pennsylvania in considering and reviewing the action of the Public Service Commission is judicial. Thus, having passed by the ending of the administrative proceedings, and having thereafter entered a state judicial tribunal, the complainants must abide the consequences, one of which is that they are confronted with the lack of jurisdiction of this court to grant the relief sought. Section 265 of the Judicial Code provides that: ‘The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state.’ The prohibition of section 265 of the Judicial Code denying the right of any court of the United States to stay proceedings in any court of a state extends to the entire proceedings from the commencement of the suit until the execution issued on the judgment is satisfied. *Dorrance et al. v. Martin et al.*, *supra*. To grant the relief sought would in effect stay the proceedings of the superior court of Pennsylvania. This court is without jurisdiction to grant such relief.

“The rule for preliminary injunction is discharged, and the bill is dismissed.”

In *Burford v. Sun Oil Company*, 319 U. S. 315, 87 L. Ed. 1424, we find the following at page 1426:

“Although a federal equity court does have jurisdiction of a particular proceeding, it may, in its sound discretion, whether its jurisdiction is invoked on the ground of diversity of citizenship or otherwise, ‘refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest’; for it ‘is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy.’ While many other questions are argued, we find it necessary to decide only one: Assuming that the federal district court had jurisdiction, should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here? * * *

“These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, ‘exercising a wise discretion,’ restrain their authority because of ‘scrupulous regard for the rightful independence of the state governments’ and for the smooth working of the federal judiciary. * * * This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers.’ *Railroad Commission v. Pullman Co.*, *supra* (312 U. S. 500, 501, 85 L. ed. 974, 975, 61 S. Ct. 643).”

In *Furnald v. Glenn* (C. C. A. 2), 64 Fed. 49, the Court states:

“* * * No authority has been cited for the proposition that one court of equity will undertake to annul the interlocutory decree of another court of

equity; and there is no support for it upon principle or in good sense. * * *

“We are of the opinion that the court below properly dismissed the complainant’s bill. To sanction his suit would be to countenance similar suits on behalf of each stockholder who may be sued for an assessment in any of the courts of the score of states in which the stockholders are to be found. The spectacle of a multitude of courts sitting concurrently in review of an interlocutory decree of a Virginia court, and assuming to control its proceedings, would be a reproach and disgrace to our jurisprudence.”

In *Ponsi v. Fessenden*, 258 U. S. 254, 66 L. Ed. 607 at 611, the Court states:

“The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy to attain which it assumed control, before the other court shall attempt to take it for its purpose. The principle is stated by Mr. Justice Matthews in *Covell v. Heyman*, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355, as follows:

“The forbearance which courts of co-ordinate jurisdiction administered under a single system, exercise towards each other, whereby conflicts are avoided by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is something more. It is a principle of right and of law, and, therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do

not belong to the same system, so far as their jurisdiction is concurrent; and although they coexist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty.’ ”

In *Davega-City Radio v. Boland* (D. C., S. D., N. Y.), 23 Fed. Supp. 969, we find:

“There is also a further reason why the suit must be dismissed, namely, the principle that a decision of a state court may not be reviewed by bill in equity in a federal court. *American Surety Co. v. Baldwin*, 287 U. S. 156, 164, 53 S. Ct. 98, 100, 77 L. Ed. 231, 86 A. L. R. 298; *Lynch v. International Banking Corp.*, 9 Cir., 31 F. 2d 942, certiorari denied 280 U. S. 571, 50 S. Ct. 28, 74 L. Ed. 624; *Furnald v. Glenn*, 2 Cir., 64 F. 49, 54; *Ritholz v. North Carolina State Board*, D. C. M. D. N. C., 18 F. Supp. 409, 413. Here the plaintiff has presented to the state court the same questions as to the jurisdiction of the state Board that it wishes this court to decide. The issue having been decided adversely to it, its remedy is appeal through the appropriate state courts, and, if necessary, review by the Supreme Court of the United States. It cannot obtain a review by this independent suit in the federal court.”

In *Gaines etc. v. City of Chicago* (C. C. A. 7), 123 F. (2d) 104, it was held that a Federal court will rarely interfere through injunction, with the conduct of a municipal government by the city's administrative officers and that

this rule finds its strictest application in cases where the order sought would regulate the granting of licenses to carry on a business in the city. Citing *City of Chicago v. Kirkland* (C. C. A. 7), 79 F. (2d) 963.

In *General Exporting Co. v. Star Transfer Co.* (C. C. A. 6, 1943), 136 F. (2d) 329, we find the following language:

“The attempt to relitigate in federal courts issues already determine in state court proceedings has been disapproved in numerous opinions of United States Courts below the grade of the Supreme Court. *Rit-holz v. North Carolina State Board of Examiners in Optometry*, D. C. N. C., 18 F. Supp. 409, 413 (three-judge court); *Davega-City Radio v. Boland*, D. C. N. Y., 23 F. Supp. 969, 970 (three-judge court); *Hall v. Ames*, 1 Cir., 190 F. 138, 140, 141; *Furnald v. Glenn*, 2 Cir., 64 F. 49, 54. Judge Parker, in the first case cited, said: ‘The remedy of plaintiffs, if they are aggrieved by the action of the state court, is appeal to the state Supreme Court, the action of which in proper cases can be reviewed by the Supreme Court of the United States by writ of certiorari. After litigating the issue in the state court, however, they cannot remove the case to the federal district court, nor can they obtain review of an adverse decision by filing a bill in equity in that court.’ ”

In *Gladstone v. Galton* (C. C. A. 9, 1944), 145 F. (2d) 742, Judge Healy states the rule:

“The complaint presented no substantial claim of deprivation of civil rights and no extraordinary circumstances justifying equitable intervention by a federal court. The constitutional question sought to

be litigated here might with equal effectiveness and greater propriety be litigated in the pending proceeding in the state court, where the right exists of ultimate review in the Supreme Court of the United States.”

Conclusion.

We respectfully submit that under the pleadings and affidavits in the record before us and upon the law as cited above, that the District Court abused its discrimination in granting a preliminary injunction.

We believe that the language of Judge Ross in *Anargyros & Co. v. Anargyros* (C. C. A. 9), 167 Fed. 753, is most apt:

“Looking at the case as made by the pleadings and affidavits, we think the most that can be fairly claimed for the complainant is that it is a doubtful one. Under such circumstances the preliminary injunction should have been denied, and the temporary restraining order vacated.”

Respectfully submitted,

DONALD J. DUNNE and
WOOD, CRUMP, ROGERS, ARDNT &
EVANS,

By DONALD J. DUNNE,

Attorneys for Appellant.

APPENDIX.

In the case of *Reichelderfer v. Quinn*, 287 U. S. 315, 77 L. Ed. 331, 53 Sup. Ct. 177, the Court said:

“For the present purposes we assume that the proposed building would divert the land from park uses, and address ourselves to the question upon which the other issues in the case depend, whether the respondents, plaintiffs in the trial court, are vested with the right for which they invoke constitutional protection

“There is no contention that such a right arises as an incident to the ownership of neighboring land, as does an easement of light and air, under the law of some states . . . but it is argued that the right asserted, whether it be regarded as arising from a contract with the government or an interest in its lands, has a definite source in the transaction by which the park was created . . . It is true that the mere presence of the park may have conferred a special benefit on neighboring owners and enhanced the value of their property. But the existence of value alone does not generate interests protected by the constitution against diminution by the government however unreasonable its action may be. The beneficial use and hence the value of abutting property is decreased when a public street or canal is closed or obstructed by public authority (citing cases), or a street grade is raised (citing cases) or the location of a county seat (citing cases) or a railroad is changed (citing cases) but in such cases no private right is infringed.

“Beyond the traditional boundaries of the common law only some imperative justification in policy will lead the courts to recognize in old values new property rights . . .

The case is clear where the question is not of private rights lone, but the value was both created and diminished as an incident of the operations of the government. For if the enjoyment of a benefit thus derived from the public acts of government were a source of legal rights to have it perpetuated the powers of government would be exhausted by their exercise.

“. . . The abutting owner cannot complain; the damage suffered by him ‘though greater in degree than that of the rest of the public is the same in kind’ . . .

“It is enough to say that the zoning regulations are not contracts by the government and may be modified by Congress.”

In *Clifton Hills Realty Co. v. Cincinnati*, 60 Ohio App. 443, 21 N. E. (2d) 993, the Court said:

“It is clear that in passing a zoning ordinance, a municipal counsel is engaged in legislating and not in contracting. The action lacks all the essential elements of a contract. No one is bound to the municipality as a result, and the municipality binds itself to no one.”

In *Eggeben v. Sonnenberg*, 1 N. W. (2d) 84, the Supreme Court of Wisconsin held that persons who had purchased property and erected single residences in a district zoned for that purpose did not acquire any vested right which would prevent the municipality from amending the zoning ordinance so as to permit the use for apartment houses of a portion of the district in the neighborhood of their residences. The Court stated as follows:

“While the respondents may suffer an annoyance they have no legal protectable rights merely because of their

reliance on the zoning ordinance. The theory of vested rights under an ordinance overlooks the fact that rights granted by legislative action under the police power can be taken away when in the valid exercise of its discretion the legislative body sees fit. The property is always held subject to the police power. The theory of vested rights relates only to such rights as an owner of property may possess not to have *his property* rezoned after he has started construction. The rationale of these cases is that he has entered on construction work or incurred liabilities for that work which he would be deprived of by the rezoning (Smith, *Zoning Law and Practice*, P. 43, P. 19, P. 122, Par. 89) . . . As long as the common council acted within the bounds of the legislative field, its discretion is controlling. A Court cannot substitute its opinion for that of the legislative body (*Metsenbaum, The Law of Zoning*, P. 77.)”

In the case of *Marblehead Land Company v. Los Angeles*, 36 F. (2d) 242, which was affirmed by the Circuit Court of Appeals, 9th Circuit, 47 F. (2d) 528, and a writ of certiorari denied by the Supreme Court in 284 U. S. 634, 76 L. Ed. 540, it was held that the fact that an oil company had leased, with a view to developing it for the production of oil a tract of land which by the zoning ordinance then in effect was expressly excepted from the residential zone, would not render invalid a subsequent ordinance by which the prior ordinance was repealed and the tract in question was included in the residential zone where oil operations were prohibited.

In *Chayt v. Maryland Jockey Club*, 18 A. (2d) 856, the Supreme Court of Maryland held that the owners of a house and lot in an area zoned as residential but near a race track had no legal right to the continuance of the existing zoning and therefore were not deprived of any vested right by an amendment to the zoning ordinance transferring certain lots in the area from residential classification to commercial.

In *People ex rel Miller v. Gill* (1945), 389 Ill. 394, 59 N. E. (2d) 671, it was held that where the owner of five lots desired to erect thereon an 80-unit apartment building, but two of the lots were restricted to single-family dwellings, an amendment to the zoning ordinance to permit the erection of the apartment building did not deprive neighboring lot owners of property without due process or take their property without just compensation.

In the case of *Queenside Hills Realty Co., Inc., v. Saal* (1946), 328 U. S. 80, 90 L. Ed. 1096, the Court states:

“Appellant’s claim of lack of equal protection is based on the following argument: The 1944 law applies only to existing lodging houses; if a new lodging house were erected or if an existing building were converted into a lodging house, the 1944 law would be inapplicable. An exact duplicate of appellant’s building, if constructed today, would not be under the 1944 law and hence could be lawfully operated without the installation of a wet pipe sprinkler system. That is said to be a denial of equal protection of the laws.

“The difficulty is that appellant has not shown that there are in existence lodging houses of that category which will escape the law. The argument is based on an

anticipation that there may come into existence a like or identical class of lodging houses which will be treated less harshly. But so long as that class is not in existence, no showing of lack of equal protection can possibly be made. For under those circumstances the burden which is on one who challenges the constitutionality of a law could not be satisfied The point is that lack of equal protection is found in the actual existence of an invidious discrimination, (*Traux v. Raich*, 239 U. S. 33, 60 L. Ed. 131, 36 S. Ct. 7, L. R. A. 1916D 545, Ann. Cas. 1917B 283; *Skinner v. Oklahoma*, 316 U. S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110), not in the mere possibility that there will be like or similar cases which will be treated more leniently.”

See also *Ex parte Quong Wo*, 161 Cal. 220; *Estate of Johnson*, 139 Cal. 532.

In the case of *People v. Globe Grain & Milling Co.*, 211 Cal. 121, the Court states:

“The contention that the statute is discriminatory is purely speculative. On its face it treats all persons in the same manner, authorizing the Commission to extend its benefits to anyone so long as the interests of the people in the preservation of food fish are safeguarded. The theory of the attack appears to be that inasmuch as the legislature has not expressly prohibited discrimination to an applicant, the Commission may therefore favor one over others, and might perhaps create a monopoly by granting a permit to one person to take all the available fish. The Courts have given scant consideration to such reasoning A statute cannot be declared unconstitutional upon such implications. The rule is just to

the contrary. It is of no consequence that the statute makes no reference to an equitable apportionment of the benefits to be granted. The important thing is that it contains no express grant of authority to the Commission to indulge in favoritism or to make or enforce discriminatory rules. A presumption of constitutionality protects every legislative act. Being silent on the matter of apportionment of the benefits, the statute will be construed together with the constitutional provisions against discrimination, and, as so considered, must be upheld.”

In the case of *Mayor etc. of City of Savannah v. Holst* (C. C. A. 5, 1904), 132 Fed. 901, the Court says:

“The original bill in this case was filed by J. B. Holst and seven others, all citizens of Georgia, against the city of Savannah, a municipal corporation chartered under the laws of Georgia, and the Savannah Electric Company, a corporation organized and chartered under the laws of Georgia. Relief was prayed for by injunction. The Circuit Court granted a temporary injunction, and the decree taking jurisdiction of the case and granting the injunction is assigned as error.

“The complainants being citizens of Georgia, and the defendant corporations, for purposes of jurisdiction, being considered citizens of that state also, the court below had no jurisdiction of the case by reason of the diverse citizenship of the parties . . . The claim on the part of the complainants that the Circuit Court had jurisdiction of the case was clearly based on the assumption that the suit was one arising under the Constitution or laws of the United States. The jurisdiction cannot be maintained on this ground unless the suit involves a controversy as to

the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends. 'And it must appear on the record,' said the court in *Western Union Telegraph Company v. Ann Arbor Railroad Company*, 178 U. S. 239, 20 Sup. Ct. 867, 44 L. Ed. 1052, 'by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States before jurisdiction can be maintained on this ground.' We are of the opinion that the record before us does not meet the requirements of this rule. It is true that the bill contains the general averment, found in many records where the jurisdiction has been denied, that the acts of the defendants sought to be enjoined 'would deprive plaintiffs of their property rights without due process of law, and in contravention of the Constitution of the United States.' This conclusion of the pleader is not controlling. We must look to the case made by the bill. The bill shows that the plaintiffs own lots fronting on Gwinnett Street, 'of which they have been in daily use'; that the electric company, one of the defendants, is proceeding to erect poles and string wires and lay tracks for the operation of its cars upon that street under the 'pretended authority of a resolution passed by the mayor and aldermen of the city of Savannah.' It is alleged that this resolution was passed at midnight, without giving the notice required by law, and that it was read but once, when the law required that it be read twice. It is then averred that the resolution is 'illegal and void,' and that it conferred no rights on the Savannah Electric Company. This laying of the tracks, etc., it is alleged, will damage

each of the complainants \$2,000, in this: that each will 'practically be prevented from using the street in front of his property and his property rights therein will be destroyed and taken away.' It also alleged that the mayor and aldermen, in passing the resolution, acted under 'assumed authority' from the State of Georgia, and as an agency of the state for governmental purposes.

"It will be observed that the complainants elaborately show that the resolution was passed without notice, and without complying with the law—clearly referring to the state law—and that, therefore, the resolution is void, and that it conferred no authority on the electric company to lay its tracks on Gwinnett Street. It is not alleged, or even asserted, in argument, that the Legislature of Georgia has passed any statute which conflicts with the Constitution or laws of the United States; nor is it alleged that it has conferred, or attempted to confer, on the mayor and aldermen of the city of Savannah the authority to enact such ordinances. The gravamen of the bill is that the city has passed a resolution void under the state law, and that the electric company is acting unlawfully under a claim of authority conferred by the resolution. The only reasonable construction that can be placed on the bill is that it asserts that the action of the municipal corporation is illegal and void because it is contrary to the laws of the state of Georgia. That contention raises questions depending for their solution on the laws of Georgia. There is no construction of the federal Constitution involved in the inquiry as to whether the resolution in question is valid or void under the Georgia laws. The bill therefore presents no dispute about the construction of the Constitution or laws of the United States in any way. The ques-

tion presented is as to the validity of the city's resolution, which is a matter of state law. *McCain v. Des Moines*, 174 U. S. 168, 19 Sup. Ct. 644, 43 L. Ed. 936. A municipal ordinance not passed under legislative authority is not a law of the state within the meaning of the prohibitions of the Constitution. *Hamilton Gas Light Co. v. Hamilton City*, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963. The jurisdiction of the Circuit Court can be sustained, if at all, only on the ground that the construction and operation of the railway enjoined deprived the complainants of their property without due process of law, in violation of the fourteenth amendment. That amendment operates against deprivation by a state, and the bill here shows that what is done is without authority, and is illegal and void. It does not appear that the municipal corporation has acted under the authority of a Georgia law alleged to be violative of the Constitution. The case comes clearly, we think, within the principle stated in *Barney v. The City of New York*, 193 U. S. 430, 24 Sup. Ct. 502, 48 L. Ed. 737, where the Supreme Court held that the Circuit Court was without jurisdiction. If it be true, as alleged in the bill, that the mayor and aldermen have passed an ordinance which, under the laws of Georgia, they had no right to pass, and that the ordinance is void, and that the electric company is trespassing on the property of the complainants or interfering with their property rights under the authority seemingly conferred by the void ordinance, these wrongs undoubtedly confer a right of action on the plaintiffs. But unless it appears from the averment of facts in the bill in such form as is required by good pleading that the suit is one which involves a controversy as to a right which depends

on the construction of the Constitution or some law of the United States, the jurisdiction cannot be maintained on that ground.

“The temporary injunction is dissolved, the decree of the Circuit Court reversed, and the cause remanded.”

In *Snowden v. Hughes* (C. C. A. 7, 1942), 132 F. (2d) 476, it is said:

“It has always been accepted that the Fourteenth Amendment does not apply to the acts of individuals, *State of Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 667; *United States v. Harris*, 106 U. S. 629, 1 S. Ct. 601, 27 L. Ed. 290; that the protection it offers is only against the acts of states. Established as this limitation is, the problem of determining what action is state action within the meaning of the amendment is not always easy. To be sure, in every case the initial question is whether the action was by a state instrumentality, but the controlling question is whether sufficient state sanction was given to such action to make it the action of the state for the purposes of the Fourteenth Amendment, since ‘Many acts done by an agency of a state may be illegal in their character when tested by the laws of the state, and may, on that ground, be assailed, and yet they cannot, for that reason alone, be impeached as being inconsistent with the due process of law enjoined upon the states. The 14th Amendment was not intended to bring within Federal control everything done by the state or by its instrumentalities that is simply illegal under the state laws, but only such acts by the states or their instrumentalities as are violative of rights secured by the Constitution of the United States.’ *Owensboro Water Works Co. v. City of*

Owensboro, 200 U. S. 38, 47, 26 S. Ct. 249, 252, 50 L. Ed. 361.

“In *Barney v. City of New York*, 193 U. S. 430, 24 S. Ct. 502, 48 L. Ed. 737, the court held that where the act complained of was forbidden by the State Legislature, it could not be said that the act was that of the state for the purposes of the Fourteenth Amendment, and the court denied the jurisdiction of the District Court to entertain the cause. This decision controls the instant case, for it appears on the face of the plaintiff’s complaint that the defendants’ acts were forbidden by the Illinois statute and that these illegal acts were the gravamen of the plaintiff’s complaint.

“We recognize that there is some question as to the current value of the *Barney* case as authority. In the light of subsequent Supreme Court cases, there can be no doubt that the broad language used in the *Barney* opinion is no longer accurate * * * but the narrow holding of the *Barney* case still stands as a matter of law and as a matter of sound federal jurisprudence. We conclude that when the act complained of is plainly and clearly in violation of a state law, as in our case, it is not an act of the state for the purposes of the Fourteenth Amendment.”

It is said in *Owensboro Waterworks Co. v. Owensboro*, 200 U. S. 38, 50 L. Ed. 361 (pp. 364-365):

“The utmost that can be said of the present case, as disclosed by the bill, is that the municipal authorities of Owensboro have done some things outside or in excess of any power the city possessed. But this does not of itself show that they acted without the due process of

law enjoined by the 14th Amendment; for, if what is complained of had been done directly by the state or by its express authority, or if the legislature could legally ratify that which the city has done, as it undoubtedly might do, no one would contend that there had been a violation of the due process clause of the amendment. It cannot be that the acts of a municipal corporation are wanting in the due process of law ordained by the 14th Amendment, if such acts, when done or ratified by the state, would not be inconsistent with that Amendment. Many acts done by an agency of a state may be illegal in their character when tested by the laws of the state, and may, on that ground, be assailed, and yet they cannot, for that reason alone, be impeached as being inconsistent with the due process of law enjoined upon the states. The 14th Amendment was not intended to bring within Federal control everything done by the state or by its instrumentalities that is simply illegal under the state laws, but only such acts by the states or their instrumentalities as are violative of rights secured by the Constitution of the United States. A different view should give to the 14th Amendment a far wider scope than was contemplated at the time of its adoption, or than would be consonant with the authority of the several states to regulate and administer the rights of their peoples, in conformity with their own laws, subject always, but only, to the supreme law of the land.”

In the case of *Defiance Water Co. v. Defiance*, 191 U. S. 184, we find the following significant language:

“* * * Ordinarily the question of the repugnancy of a state statute to the impairment clause of the Constitution is to be passed upon by the state courts in the

first instance, the presumption being in all cases that they will do what the Constitution and laws of the United States require (*Chicago & A. R. Co. v. Wiggins Ferry Co.*, 108 U. S. 18, 27 L. ed. 636, 1 Sup. Ct. Rep. 614, 617); and if there be ground for complaint of their decision, the remedy is by writ of error under Sec. 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575). Congress gave its construction to that part of the Constitution by the 25th section of the judiciary act of 1789 (1 Stat. at L. 85, chap. 20), and has adhered to it in subsequent legislation.” (p. 143.)

* * * * *

“Litigation in the state courts cannot be dragged into the Federal courts at such a stage and in such a way. The proposition is wholly untenable that, before the state courts in which a case is properly pending can proceed to adjudication in the regular and orderly administration of justice, the courts of the United States can be called on to interpose on the ground that the state courts might so decide as to render their final action unconstitutional.

“Moreover, the state courts are perfectly competent to decide Federal questions arising before them, and it is their duty to do so. *Robb v. Connolly*, 111 U. S. 624, 637, 28 L. ed 542, 546, 4 Sup. Ct. Rep. 544; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 556, 583, 40 L. ed. 536, 543, 16 Sup. Ct. Rep. 839.

“And, we repeat, the presumption is in all cases that the state courts will do what the Constitution and laws of the United States require. *Chicago & A. R. Co. v. Wiggins Ferry Co.*, 108 U. S. 18, 27 L. ed. 636, 1 Sup. Ct. Rep. 614, 617; *Shreveport v. Cole*, 129 U. S. 36, 32 L. ed. 589, 9 Sup. Ct. Rep. 210; *Neal v. Delaware*, 103

U. S. 370, 389, 26 L. ed. 567, 571; *New Orleans v. Benjamin*, 153 U. S. 411, 424, 38 L. ed. 764, 769, 14 Sup. Ct. Rep. 905.

“If error supervenes, the remedy is found in sec. 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575.)

“The present case strikingly illustrates the applicability of these well-settled principles. The preliminary injunction was dissolved by the court by which it was granted, and the city’s suit was dismissed by the highest judicial tribunal of the state.

“We regard this bill as an attempt to evade the discrimination between suits between citizens of the same state, and suits between citizens of different states, established by the Constitution and laws of the United States, by bringing into the circuit court controversies between citizens of the same state,—an evasion which it has been the constant effort of Congress and of this court to prevent (*Bernards Twp. v. Stebbins*, 109 U. S. 341, 353, 27 L. ed. 956, 960, 3 Sup. Ct. Rep. 252; *Shreveport v. Cole*, 129 U. S. 36, 44, 32 L. ed. 589, 592, 9 Sup. Ct. Rep. 210); and are of opinion that it should have been dismissed for want of jurisdiction.”

In the case of *Pennsylvania Company v. Sun Company*, 290 Pa. 404, 138 Atl. 909, the Court discusses the principle of law regarding anticipated nuisances as follows:

“The bill does not charge any such inherent characteristic or any such likelihood of danger. True, it does say that petroleum and its by-products are highly explosive, readily ignited, and susceptible to ignition from lightning, spark, flame, intense heat of the sun, or internal combus-

tion. It does not charge that the natural, the probable result of the building with its contents will be an explosion or a fire. It does not charge that this would be a 'plainly manifest' result from placing oil or its by-product in the tank. It does charge that, because it is readily ignited, and because it is susceptible to ignition, the result of the building under those circumstances would be a constant menace and danger. All of this is purely problematic or conjectural. Of course, petroleum and its by-products, under the circumstances here existing, are readily ignited; but will they be ignited? Is that likely? Does common experience show it? Is the manner of use as described such that the probabilities are that they will be? The words 'readily' and 'susceptible' are words of anticipation, apprehension, or mere fear, or, as the authorities say, doubtful, eventual or contingent. The statement that the use becomes a menace is but a conclusion based on these antecedent conjectures.

"There is no allegation in the bill that the construction is improper, that the equipment is not of the ordinary and usual kind, or that the regulation of the plant and its supervision is not of the best; nor does the bill aver that there will be a failure to afford proper appliances in its conduct . . .

"What we have said may be summarized briefly in this way: Where it is sought to enjoin an anticipated nuisance; it must be shown (a) that the proposed construction or the use to be made of property will be a nuisance *per se*; (b) or that, while it may not amount to a nuisance *per se*, under the circumstances of the case, a nuisance must necessarily result from the contemplated act or thing. See 7 A. L. R. 749, 26 A. L. R. 937. The injury must be

actually threatened, not *merely anticipated*; it must be *practically certain*, not *merely probable*. It must further be shown that the threatened injury will be an irreparable one which cannot be compensated by damages in an action at law. A mere decrease in the value of complainant's property is not alone sufficient. *Rhodes v. Dunbar*, 57 Pa. 274, 98 Am. Dec. 221." (Italics added.)

In *People v. Hawley*, 207 Cal. 295, the Court says:

"No authority is required to support the proposition that the business of excavating rock and gravel by the owner from lands belonging to him is a lawful and useful occupation, and cannot be prohibited by legislation except in cases where the enactment of such legislation may be found necessary for the protection of the legal rights of others. If authority were necessary we have but to refer to a decision of this court, *In re Kelso*, 147 Cal. 609 (109 Am. St. Rep. 178, L. R. A. (N. S.) 796, 82 Pac. 241). That case, we think, sheds some light upon the general aspect of the present action. An ordinance of the city and county of San Francisco was there under consideration wherein the attempt was made to prohibit the operation of any rock or stone quarry within certain prescribed limits of said municipality. This court, in declaring said ordinance unconstitutional and void, said (p. 612): 'Applying these well-recognized principles to the ordinance before us, we are unable to perceive any ground upon which it may be sustained as a legitimate exercise of the police power. It is in no sense a mere regulation as to the manner in which rock or stone may be removed from the land by the owner thereof, but is an absolute prohibition of any such removal. However valuable the rock or stone may be if removed, and however valueless if not removed, the owner must allow it to remain in its place

of deposit. Such a prohibition might be justified, if the removal could not be effected without improperly invading the rights of others, but it cannot be doubted that rock and stone may under some circumstances be so severed from the land and removed as not in the slightest degree to inflict any injury which the law will recognize. So far as such use of one's property may be had without injury to others it is lawful use which cannot be absolutely prohibited by the legislative department under the guise of the exercise of the police power.' This court has even gone so far as to hold an ordinance void which prohibited the operation and maintenance of a rock-crusher in this same Arroyo Seco and situated only a short distance from the lands of the present plaintiff, the Los Angeles Rock & Gravel Company. (*In re Throop*, 169 Cal. 93 (145 Pac. 1029).) It will be noted, however, that in the present action the rock-crusher of the company is not located or operated upon any of the lands herein involved. The record shows that the company owns and maintains a rock-crusher on land situated to the south of the lands involved in the present action, and that it only seeks to excavate by means of an electric shovel rock, gravel and sand from its said land, which materials when so excavated are loaded upon trucks, and transported to said rock-crushing plant of the company, where they are treated and prepared for commercial uses. We have already referred to the fact that in the action of *People v. Hawley* the trial court abated all nuisance of which complaint was made and which it was alleged and found were caused by the Los Angeles Rock & Gravel Company in their excavations upon the lands owned by it and comprising approximately one hundred and thirty acres. The trial court found that to permit the company to continue its excavation operations upon said lands subject to the conditions imposed upon said operations by the judgment and

decree in *People v. Hawley, et al.*, would not result in any substantial injury to adjoining property or to persons residing or owning property in the near vicinity of the lands of said company. Any ordinance of said city which would enjoin and prohibit the company from thus using its property is therefore void, as an unreasonable restraint upon the use by it of its property and an unwarranted interference with the right of said company to carry on a lawful business and to use and enjoy its own property.”

The facts in the *Hawley* case are substantially the same as those in the instant case. The contemplated operation, by the evidence, is revealed as being substantially the same as those in the *Hawley* case.

In Pomeroy's Equity Jurisprudence, Vol. 5, Sec. 1945, we find the following statement:

“When the defendant's business which constitutes the nuisance complained of is one from which the public benefits directly or in an unusually marked degree, the balance of injury presents itself in a different form. Shall the plaintiff by procuring an injunction put an end to a business from which the public receives large benefit, and from the stopping of which public hardship would ensue? . . . We think it may be safely assumed that the rule in equity is, that where the damages can be admeasured and compensated, equity will not interfere where the public benefit greatly outweighs private and individual inconvenience.”

And again in Sec. 1948 we find the following statement:

“The forms of injunction used against nuisances illustrate to an unusual degree both the flexibility of equitable procedure and also the relative nature of nuisances. In a

great many cases a thing is a nuisance not because it is in itself deemed wrongful in law, but because the manner in which it is done, or the extent to which it is carried, causes it to cross the line beyond which the law will not allow one to go, even in the strict conduct of his own business. This situation is recognized by equity courts in granting injunctions, with the result that they are generally so framed as to prohibit only that part of the thing complained of which is injurious, saving to the defendant the right to continue his business if it can be conducted in a harmless way. 'Injunctions against carrying on a legitimate and lawful business should go no further than is absolutely necessary to protect the lawful rights of the parties seeking such injunction. When a person is engaged in carrying on such business, he should not be absolutely prohibited from doing so, unless it appears that the carrying on of such business will necessarily produce the injury complained of. If it can be conducted in such a way as not to constitute a nuisance, then it should be permitted to be continued in that manner.' (Citing cases.) This result is sometimes reached by inserting in the prohibition such qualifying words as 'to the injury or damage of the plaintiff,' or others of similar nature; sometimes by giving the defendant leave to apply for a modification of the injunction upon giving satisfactory proof that he can and will conduct his business so as not to amount to a nuisance. Or the court may make a tentative specific order, subject to be modified if experience shows it does not satisfactorily accomplish its purpose. In accordance with the same principle injunctions will not be issued, it is said,

against a business which is a nuisance, when the nuisance can be remedied by the use of scientific appliances; instead the court will direct the introduction of such appliances, and whenever necessary to prevent hardship a reasonable amount of time, in which the defendant may conform to the injunction, will be allowed.”

Citing *Judson v. Los Angeles Suburban Gas Company*, 157 Cal. 168.

In *McMenomy v. Baud*, 87 Cal. 134, the Court states:

“The judgment perpetually enjoins the defendant ‘from erecting, maintaining, having, keeping, or operating on said premises of defendant, described in the pleadings and records herein, said brass-foundry and machine-ship, boiler and engine, or any foundry or machine-ship, boiler or engine, causing noises, smoke, or other effluvium, injurious to health, offensive to the senses, or an obstruction to the free use of plaintiff’s property described herein.’ And further orders and decrees that a permanent injunction issue to defendant and his servants and employees, ‘requiring him and them, and each of them, to perpetually refrain from having, maintaining, operating, or continuing the use of said brass-foundry and machine-shop, boiler and engine, or either thereof, on the said premises of defendant, and requiring him and them, and each of them, to perpetually refrain from having, erecting, maintaining, or operating any brass-foundry, or foundry or machine-shop, boiler or engine, thereon, causing noises, smoke, or other effluvium, injurious to health, offensive to the senses, or an obstruction to the free use of plaintiff’s property described herein, and that said nuisance now maintained on said premises of defendant be abated.’

“There is no finding and no evidence to justify a finding, that either of these causes of annoyance and injury to plaintiff was necessarily incident to the proper opera-

tion of the foundry or machinery complained of. Indeed, the evidence tends to prove that the injurious effects may be remedied without enjoining the running of the foundry or machinery, and that it was only improper and negligent manner of running them that caused the injurious effects upon the plaintiff and his property. It is said that the smoke-stack and the steam-escape pipe are too low, that the boiler and engine are not properly set, and that the fuel is not such as should be used. There is no pretense that the 'dipping' of brass castings in diluted acids, *upon the sidewalk*, was necessary, or that such dippings might not be done at some other place, from which the fumes would not reach plaintiff's house; nor that the improper obstruction of the sidewalk was necessary to the proper operation of the foundry or machinery.

"A brass-foundry and machinery incident thereto are not *prima facie* nuisances; and a plaintiff who complains of them must allege and prove that they are such by reason of their peculiar location or the improper or negligent manner in which they are conducted. Therefore, where the injurious effects complained of may be prevented without abating or enjoining the works or the operations thereof entirely, only the causes of the specific injurious effects proved should be enjoined. If, for example, the cause be the production and escape of smoke and soot in such a way as that they penetrate plaintiff's premises, to his injury, the remedy by injunction should be restricted to this specific injury, and leave the defendant at liberty to operate his works, if he can, and elects to do so, in such a manner as to remove the cause and prevent the injury. (*Tuebner v. Cal. St. R. R. Co.*, 66 Cal. 171; *Sullivan v. Royer*, 72 Cal. 248; 1 Am. St. Rep. 51; Cooley on Torts, 2d ed., 714 *et seq.*; Wood on Nuisances, secs. 144, 151, 556, 565; *Carson v. Central R. R. Co.*, 35 Cal. 332; *Brown v. Kentfield*, 50 Cal. 129)."

No. 11,861

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. D. GREGG,

Appellant,

vs.

HENRY WALLACE WINCHESTER, *et al.*,

Appellees.

APPELLEES' BRIEF.

OLIVER O. CLARK,

ROBERT A. SMITH,

643 S. Spring St., Suite 710, Los Angeles 14, California,

Attorneys for Appellees.

FILED

AUG 19 1948

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No. 11,861

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. D. GREGG,

Appellant,

vs.

HENRY WALLACE WINCHESTER, *et al.*,

Appellees.

APPELLEES' BRIEF.

Jurisdiction of the Court.

The jurisdiction of the court in this proceeding, derives from those allegations of the complaint which allege a violation, by the City of Los Angeles, a municipal corporation, of the rights and immunities of appellees under the Fourteenth Amendment to the Federal Constitution. These allegations are set forth in *forty-six* paragraphs of the complaint herein [Tr. Vol. I, pp. 3 to 59, incl.].

Appellant's effort (his brief, p. 1) to limit the basis of jurisdiction to the allegation of *only four* of these *forty-six* paragraphs, is wholly misleading and unsound. The facts pleaded, and from which jurisdiction derives, are specifically hereinafter set forth, and reference thereto is hereby made.

Introduction.

In this suit plaintiffs seek a judgment that the action of the City Council of the City of Los Angeles, is unconstitutional and void, under the Fourteenth Amendment to the Federal Constitution, wherein on October 2, 1946, said Counsel purported to grant to the defendant John D. Gregg, a variance permit to excavate to a depth of one hundred feet, or more, for the commercial production of rock, sand, and gravel, an area of land containing about 115 acres situated *in the heart of a residential community* comprising about one and one-half square miles, from which said operations then were, and for more than twenty years continuously theretofore had been, *excluded* by zoning regulations. Plaintiffs contend that this legislative act is an *unreasonable* exercise of the police power in the circumstances of this case.

During a period of thirty-two years immediately preceding the grant of this permit, this community area had been *continuously* protected against the rock industry. This exclusion was accomplished, during the first twelve years of this thirty-two year period, by deed restriction, and during the next twenty years, by zoning regulation.

Under the *encouragement* of this protection against the permanent, devastating, influence of such operations, this small community area was improved during said period, with more than 360 homes occupied by more than 1750 persons of whom more than 350 were children under the age of sixteen years; *two churches*, attended by more than 300 persons each Sunday; a kindergarten and elementary grade school attended by 418 pupils; a public park and recreation center attended by more than 200 persons each

day, and 2,000 persons each week, many of whom are children under the age of six years, who, unattended, patronize the supervised recreational facilities of said recreation center, for the maintenance of which the City expends about \$6,000 annually; about one and one-half miles of concrete paved streets which were improved at the expense of the property within said area; the installation, at the expense of the property within this area, of an adequate water supply and distribution system; a City Fire Department which in efficiency is about four times greater than that required by the National Fire Underwriters Board; an American Legion Hall adequate for the needs of its membership of 118, and a Medical Clinic.

During the two and one-half years immediately preceding the grant of this permit (October 2, 1946), fourteen home owners, at a cost to them of more than \$150,000 purchased and improved their home properties which lie either *immediately adjoining*, or *immediately across a forty foot street* from, said critical area.

In their purchase of these homes many of these purchasers first inquired of the City as to the zoning restrictions, and were told by the City that this area was zoned for *residential* use, and that several applications for permission to excavate rock aggregates in this community area had been denied by the City. These persons would not have purchased or improved these properties had they known there was any probability of permission being granted to excavate within this area for the production of rock aggregates.

The conduct of operations as permitted by said variance permit, would substantially interfere with, and impair,

the comfortable enjoyment of their homes, create a serious hazard to the health and lives of the residents within said community, particularly of the young children and aged people; would substantially depreciate the value of the properties within said community, and would leave a large permanent pit one hundred feet deep, *as a permanent hazard*, within this community area.

The defendant Gregg purchased these 115 acres of land during a period of five years immediately preceding the grant of this permit, for an aggregate sum of about \$75,000. These 115 acres of land are well adapted to residential development and use; are in substantial demand for that use, and for that use have a reasonable market value in excess of \$275,000—a profit to Gregg, *for residential development*, of more than \$200,000, or nearly three hundred per cent upon his short time investment.

During this thirty-two year period of *residential encouragement*, development, use, and protection against any invasion by the rock industry, *no substantial change in conditions* has occurred within this community area. It is now, and consistently has been throughout that thirty-two year period, a *residential community* enjoying a normal development, *under the exclusion of the rock industry*, by the addition of homes; churches; public educational and recreational facilities; utilities; paved streets, and a high type of residents banded together for community development and protection in customary civic associations.

In the circumstances pleaded, and but briefly reviewed hereinbefore, the plaintiffs contend, and, assuming the truth thereof, the learned trial court held, that the grant of this permit was an unreasonable exercise of the police

power, and therefore, was in violation of the Fourteenth Amendment to the Federal Constitution, and is void. Thereupon, the order of injunction of which appellant here complains, was issued to maintain the *status quo*, pending a trial of the case upon its merits.

Statement of Facts.

The verified complaint pleads:

(1) that the defendant City is, and at all times mentioned in the complaint was, a municipal corporation organized and existing under a municipal charter in the State of California [Tr. Vol. 1, p. 4];

(2) that a map attached to said complaint, and made a part thereof, is a substantially correct representation, upon a scale of one inch to each one thousand lineal feet, of an area of land comprising about one and one-half square miles situated within said City of Los Angeles, and that the areas therein shown as highways; community park; community church; community chapel; community school; and homes for human residence, are substantially correct, and are devoted to said respective uses [Tr. Vol. 1, p. 60];

(3) that in said complaint, the area of said 115 acres of land, as shown upon said map, is referred to as the "*Critical*" area, and the area enclosed with a heavy line is referred to as the "*Community*" area and the area covered by said map is referred to as the "*Map*" area [Tr. Vol. 1, pp. 4 to 7, incl.];

(4) that in 1914, in accordance with a prior survey, the lands within this community area, having been theretofore subdivided for *residential-agricultural* use, were by deed restrictions, *restricted* to that

use and *against* the production of rock aggregates, for the next ensuing twenty years [Tr. Vol. 1, pp. 7, 8 and 10];

(5) that thereupon these lands were offered for sale, and many parcels were sold and developed for *residential uses* [Tr. Vol. 1, pp. 15 and 16];

(6) that in 1918, this area, then known as a part of Hansen Heights, was annexed to the City of Los Angeles [Tr. Vol. 1, p. 10];

(7) that in 1919, the residents of this area, in conjunction with those of a larger area, organized Mun. Imp. Dist. No. 9, and bonded their properties for \$150,000, to obtain, and assure, and thereby obtained, an adequate water supply for this area;

(8) that in 1924, one Mrs. Lewis Kane, in violation of said deed restrictions, began the excavation of rock aggregates within said area, and was promptly and permanently enjoined by Dr. Hansen and the L. A. Land and Water Co., as the owners of the unsold portion of said lands, and of reversionary rights under said deed restrictions;

(9) that in July, 1925, nearly nine years before the expiration of said deed restrictions, the City enacted its *zoning* ordinance No. 52,421, by which this community area was declared to be a *residential* area, and from which *the mining of rock aggregates was excluded* [Tr. Vol. 1, pp. 10 and 11];

(10) that in June, 1926; May, 1927; August, 15th, 1927; and August 27th, 1927, by its enactment of its ordinances numbers, respectively, 55,129; 57,958, 58,624, and 58,375, *the city reaffirmed its*

zoning classification of this community area as a *residential* area, and its exclusion therefrom of the business of mining rock aggregates [Tr. Vol. 1, p. 11];

(11) that in June, 1926, and in June, 1928, *upon petition of the people*, the City consummated proceedings for the concrete paving of about seven and one-half miles of the public streets within said area, and *assessed the costs* of said improvement upon the lands within said area [Tr. Vol. 1, p. 5];

(12) that in 1928, *upon petition of the people*, the City consummated proceedings for the organization of Mun. Imp. Dist. No. 57, and the acquisition and improvement of a fifteen acre public park and recreation center, on the westerly side of Wicks Avenue, immediately southerly of Dronfield Avenue, in said community area, and *bonded the property* within said community area, for the payment of its cost [Tr. Vol. 1, pp. 14 to 16, incl.]. This park is separated from said *critical* area, only by a street forty feet wide;

(13) that in June, 1930; February, 1933; September, 1934, and November, 1936, the City by its enactment of its ordinances numbers, respectively, 66,750; 72,327; 74,140, and 77,000 *reaffirmed its zoning* classification of this community area as a *residential area*, and its exclusion therefrom of the business of mining rock aggregates [Tr. Vol. 1, p. 11];

(14) that in August, 1934; July 7th, 1936; July 21st, 1936; July 7th, 1939, and January, 1940, the City Planning Commission *reaffirmed its zoning* protection of this community, by denying five separate applications for permission to mine rock aggre-

gates within this community area. Two of these applications were appealed to, and denied by, the City Council. Three of these applications involved land covered by the permit challenged here [Tr. Vol. 1, pp. 11 to 13, incl.];

(15) that in 1942, *upon petition of the people*, the Remsen Avenue school, located about one-half mile westerly of this community area, and about 900 feet from a potential rock excavation operation, was abandoned, and as a replacement therefor, the Stonehurst School was established within this community area, as shown upon said map, about 600 feet from the critical area covered by the permit under challenge herein [Tr. Vol. 1, pp. 17 to 20, incl.];

(16) that in 1944 the City began, and continued through 1945, and until March 7th, 1946, a comprehensive survey and study of zoning conditions, and on that date, March 7th, 1946, it enacted its comprehensive zoning ordinance, number 90,500, which became effective June 1st, 1946. By this ordinance, the City *reaffirmed* its classification of this community area as a *residential* area, and its exclusion therefrom of the business of mining rock aggregates, upon the ground that the continuance of such restriction was "necessary in order to encourage the most appropriate use of land; to conserve and stabilize the value of property; to provide adequate open spaces for light and air; * * * to facilitate adequate provisions for community utilities and facilities such as, transportation, water, sewerage, schools, parks and other public requirements, and to promote health, safety and the general welfare." [Tr. Vol. 1, pp. 20 to 22, incl. and p. 62];

(17) that during the *thirty-two year period* from 1914 (the year of the deed restrictions), to October 2nd, 1946 (the date of the permit challenged here), this community area, of less than one and one-half square miles, under the *encouragement* of said deed and *zoning* protection against the rock industry, was improved with more than 360 homes occupied by more than 1750 persons of whom more than 350 were children under the age of sixteen years; *two churches*, attended by 418 pupils; a public park and recreation center attended by more than 200 persons each day, and 2000 persons each week, many of whom are children under the age of six years, who, unattended, patronize the supervised recreational facilities of said recreation center for the maintenance of which the City expends about \$6,000 annually; a City Fire Department which in efficiency is about four times greater than that required by the National Fire Underwriters Board; an American Legion Hall adequate for the needs of its membership of 118 [Tr. Vol. 1, p. 48], and a Medical Clinic [Tr. Vol. 1, p. 22];

(18) that during the two and one-half years immediately preceding October 2nd, 1946, fourteen of the home owners in said community area, *at a cost to them of more than \$150,000*, purchased and improved their home properties *which lie either immediately adjoining, or immediately across a forty foot street, from said critical area.* [Tr. Vol. 1, p. 44.] In their purchase of these homes many of these purchasers first inquired of the City as to the zoning restrictions, and were told by the City that this area was *zoned for residential* use, and that several applications for

permission to excavate rock aggregates in this community area had been denied by the City. These persons would not have purchased or improved these properties had they known there was any probability of permission being granted to excavate within this area for the production of rock aggregates [Tr. Vol. 1, pp. 15 to 18, incl., and pp. 38 to 44, incl., and pp. 48 to 49, incl.] ;

(19) that in 1946, the assessed value of the land and improvements in private ownership within this community area of one and one-half square miles, was about \$500,000—an increase of about \$150,000 over the preceding year. That this indicates an overall value, during 1946, of land in private ownership within said community area, of more than four million dollars (\$4,000,000) ;

(20) that the lands which comprise the critical area involved here, have a reasonable market value of \$2,500 per acre, *for residential development* and use, under zoning protection against the rock industry [Tr. Vol. 1, pp. 571 to 574, incl.] ;

(21) that the defendant Gregg paid for the 115 acres of land covered by this permit, during the *five years* immediately preceding October 2nd, 1946, an aggregate sum of about \$75,000 [Exhibit 3] ;

(22) that there was at the time of the grant of said permit, and would be now were it not for said permit, a substantial demand for the land which comprises said critical area, for development and use for *residential* purposes, and that said land is reasonably adapted to that use [Tr. Vol. 1, pp. 47, 48 and 50, and p. 9, and pp. 571 to 574, incl.] ;

(23) that during this thirty-two year period of *residential* classification, development, use, and protection against the invasion by the rock industry, *no substantial change in conditions* has occurred within this community area. [Tr. Vol. 1, p. 31.] It is now, and consistently has been throughout that thirty-two year period, a *residential community* enjoying a normal development *under the exclusion of the rock industry*, by the addition of homes; churches; public educational and recreational facilities; utilities; paved streets, and a high type of residents banded together for community development and protection in customary civic associations [Tr. Vol. 1, pp. 9, and 21 to 22, incl., and 25];

(24) that immediately following the effective date (June 1st, 1946) of said comprehensive *zoning* ordinance number 90,500, the defendant Gregg applied to the Planning Commission of said City for a permit to excavate said critical area which was then owned by him [Tr. Vol. 1, pp. 27 to 28, incl.];

(25) that said application was denied by said Planning Commission, by the unanimous votes of all of its members, on July 25th, 1946, upon the grounds (1) that an excavation for the commercial production of rock, sand, and gravel, was *not* the highest and best use of said land; (2) that said property *is adapted* to residential development and use; (3) that the "RA" zoning then upon said property, was appropriate for said property and for that general area, *as evidenced by the residential development* in that immediate neighborhood; (4) that the pit which would be left after the excavation was completed,

would create an unsightly and dangerous condition, detrimental to the public welfare and safety, and would leave the land in a condition unsuited for use in keeping with others in that community; (5) that the creation of such a condition would adversely affect individual property rights, and would interfere with the normal growth of that community, and (6) would conflict with the objectives of the City's Master Plan of Zoning [Tr. Vol. 1, pp. 28 to 30, incl.];

(26) that thereupon the defendant Gregg appealed to the City Council from said adverse ruling by said City Planning Commission, and, in support of his appeal, *he falsely represented* that said property as to which he sought said permit, was situated in a district, the character of which *is unsuited* for residential purposes, and "is primarily *suitable only* for production of sand, rock and gravel" [Tr. Vol. 1, p. 30];

(27) that on October 2nd, 1946, eleven members of the City Council, each of whom on the preceding March 7th (upon the grounds, stated in paragraph 16 hereof), had voted to continue said twenty-one year zoning restriction against any excavation for the commercial production of rock aggregates in this community area, voted to grant this permit to the defendant Gregg, to excavate this 115 acre tract *in the heart* of this community area [Tr. Vol. 1, pp. 30 to 33, incl.];

(28) that this permit, in terms, authorizes Gregg to excavate this land to a depth of one hundred feet, *or more if Gregg chooses*, with banks having a slope,

of one vertical foot to each horizontal foot, and which at surface would extend to a line fifty feet from the abutting property or street, providing *only* that Gregg shall construct a 6-foot cyclone type mesh wire fence around said property, with barbed wire on the top, if the Fire Department approves; that no *permanent* plant, building, or structure, be installed or maintained on said property; that the mining be done by an electrically powered shovel and primary crusher; that the material be transported by a conveyor belt system through a tunnel under Glenoaks Boulevard to Gregg's present plant, and be processed at said plant, and that the fifty foot setback area be screen planted progressively as excavation proceeds [Tr. Vol. 1, pp. 30 and 31];

(29) that said application, and the grant of said permit, was, and is, *opposed*, not only by the City Planning Commission, but also by the City Board of Education, the Health Department of the City School System, the City Park, Playground, and Recreation Department, the principal and teachers of the School in this community area; the churches; the American Legion Post, and the people throughout a large area of which this community is a part [Tr. Vol. 1, pp. 34, 45 and 48];

(30) that the conduct of operations as permitted by this permit upon this 115 acre tract of land, would produce loud, raucous noises, and dust and dirt, that would be carried to the homes within said community area, and which would substantially interfere with, and depreciate, the comfortable enjoyment of said homes by the owners and occupants thereof, and

would constitute a substantial detriment to the health of the inhabitants of said community area, and would substantially interrupt, and interfere with the proper conduct of the school, and the supervised recreational courses of the City Recreation Department, in said public park in said community area [Tr. Vol. 1, pp. 36 to 38, incl.; pp. 51 to 53, incl., and p. 56];

(31) that the pit which would be created by the excavation of said area, would be attractive to children of tender years, and would be a substantial and permanent hazard and danger to the safety of the children in said community area, and that such hazard and danger would not be materially obviated by said prescribed fencing and screen plantings [Tr. Vol. 1, pp. 18, 28 to 29, incl., and 52 and 53];

(32) that since the grant of said permit, said defendant Gregg has conducted substantial excavation operations upon said critical area upon both sides of Glenoaks Boulevard, at the intersection of Peoria Street, for the avowed purpose of constructing a tunnel under said Glenoaks Boulevard, and that said operations were conducted upon 68 days beginning with October 3rd, 1946,—the next day after the grant of said permit, and ending on June 9th, 1947 [Tr. Vol. 1, pp. 50 and 51];

(33) that said operations constantly produced loud, raucous noises, and substantial quantities of dust and dirt; that said noises, dust and dirt carried to, and penetrated, the home of the named plaintiffs, and of many others within said community area; and substantially interfered with, disturbed, and depreciated, the comfortable enjoyment of said homes by the occupants thereof [Tr. Vol. 1, pp. 51 and 52, and Vol. 2, pp. 566 and 567];

(34) that there is an adequate, economically available supply of rock aggregates, equal in quality to the materials on deposit in the San Fernando cone, without interrupting or interfering with any residential development, and which is obtainable at a cost which the market can afford to pay [Tr. Vol. 1, pp. 33 and 34];

(35) that the conduct of operations under this permit, and the excavation of a *permanent pit one hundred feet deep and more than ninety acres in area*, in the heart of this community, would very substantially disturb the residents of this community in their comfortable enjoyment of their homes, and would very substantially depreciate the market value of their properties [Tr. Vol. 1, pp. 55 and 56];

(36) that the structure and placement of the materials which compose said lands within said critical area, are such that there is a reasonable probability that in the course of time, by natural processes of erosion, or otherwise, the side walls of a pit dug thereon, at their surface would recede, so that said pit would substantially encroach upon the public streets, and upon the improved lands which bound said critical area, and would thereby destroy some substantial portion thereof [Tr. Vol. 1, pp. 35 and 36, and Vol. 2, pp. 568 and 569];

(37) that, excepting for the plaintiff Dell'Olio, *each* of the plaintiffs is an owner of a parcel of land situated within said community area, which is, and for many years has been improved, occupied, and used, as and for residential uses and purposes, and has a reasonable market value in excess of \$12,000,

and that each of said plaintiffs actually resides upon his said property with his family [Tr. Vol. 1, p. 40];

(38) that the conduct of operations upon said critical area, as authorized by said permit, would depreciate the reasonable market value of each of said home properties in a sum substantially in excess of \$3,000, and that by the conduct of such operations, each of said plaintiffs would be damaged in a sum in excess of \$3,000 [Tr. Vol. 1, p. 40];

(39) that the defendant Gregg threatens to, and will unless restrained by an order of Court, excavate said critical area for the commercial production of rock, sand, and gravel, as authorized by, and under the purported authority of said variance permit [Tr. Vol. 1, p. 59];

(40) that the conduct of said defendant City, in its grant of said variance permit in the circumstances of this case, is an unreasonable and oppressive exercise of its police power as to the persons and properties within said community area, and is in excess of the just limits of its police power, and is in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America [Tr. Vol. 1, p. 53];

(41) that said conduct of said defendant City, constitutes a taking of the properties of these plaintiffs without just compensation, and without any public necessity therefor, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America [Tr. Vol. 1, p. 53];

(42) that said conduct of said defendant City, is an unwarranted invasion and confiscation of the

properties, and property rights, of these plaintiffs, and a violation of the Fifth and Fourteenth Amendments to the Constitution of the United States [Tr. Vol. 1, p. 54];

(43) that in its grant of said permit said defendant City exercised its police power solely for the benefit of said defendant Gregg, and in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America [Tr. Vol. 1, pp. 54, 55];

(44) that in the circumstances of this case the defendant City was, and is, estopped to grant said permit [Tr. Vol. 1, pp. 56, 57];

(45) that in the circumstances of this case, the defendant Gregg is estopped to exercise any of the privileges of said permit, or to conduct said operations upon said critical area [Tr. Vol. 1, p. 50];

(46) that by reason of the operations conducted by said defendant Gregg, upon said critical area, under the purported authority of said variance permit between the date of the grant of said permit, and the commencement of this suit, each of the plaintiffs herein has been damaged in a sum in excess of \$3,000, and that no part thereof has been paid, or satisfied, and that the whole thereof is owing and unpaid [Tr. Vol. 1, pp. 57, 58], and

(47) that none of these plaintiffs has any plain, speedy, or adequate, remedy at law [Tr. Vol. 1, p. 3].

Appellant, in his statement of the case, which statement is limited to three and one-half pages (App. Br. pp. 2 to 5, incl.), *ignores altogether* the important facts

which affirm conclusively, the fatal unreasonableness of the zoning action here complained of, and *substantially misstates* the record as to other matters.

Appellant's omissions, and their aggravating character, are so obvious from a reading of the complaint (57 pages of the printed transcript) and the supporting affidavits, that further comment thereon is not necessary.

Appellant's important *misstatements* of the record, are five in number. These appear in Appellant's Brief at page 2, lines 3, 4, 7, 8, and 9, and at page 3, lines 7, 8, and 29, and at page 4, lines 6 and 7.

(App. Br. p. 2, lines 3 and 4):

Here, appellant states that this 115 acres of land has substantial value *only* for the excavation and production of rock, sand, and gravel. *This statement is untrue.* It is refuted by the allegations of the complaint [Tr. pp. 9, 21, 47 and 48]; by the affidavits of the realtors Albert M. Scheble [Tr. pp. 571, 572] and R. L. Farley [Tr. pp. 573, 574] and by the findings of the City Planning Commission [Tr. p. 396].

(App. Br. p. 2, lines 8 and 9):

Here, appellant states that since 1934, he had been operating a gravel pit and processing plant on property *adjoining* said 115 acres. *This statement is untrue.* The record shows that Gregg's pit is separated from this 115 acres by Glenoaks Boulevard, and by a strip of land 300 feet wide from which the rock industry has been excluded for more than 32 years by deed restriction and zoning, as herein shown [Complaint, Ex. A, Tr. p. 60], and that his processing plant is located more than 1,000 feet southerly from said 115 acres of land.

(App. Br. p. 3, line 7):

Here, appellant states that the opponents of this permit were given *full opportunity* to be heard before the City Council at the time this permit was granted. *This statement is untrue.* While the fact is of no importance here, nevertheless, *the fact is* that the opponents, including the representatives of the City Park and Play Ground Department, and Board of Education, were given 30 minutes to present an opposition that could hardly be outlined, much less presented, in the allotted time.

(App. Br. p. 3, lines 27, 28, 29):

Here, appellant states that the case initiated in the State Court by *other* aggrieved property owners, was brought *on behalf of the plaintiffs in this action.* *This statement is untrue.* None of the plaintiffs here ever joined in that case, or accepted any of the benefits thereof. In these circumstances the plaintiffs here are in no manner included in that case.

(App. Br. p. 4, lines 6 and 7):

Here, appellant states that the findings of fact and conclusions of law in the *State* case, determined every issue against the plaintiffs. *This statement is untrue.* But, if it were true, that fact would not aid appellant here. It would but emphasize the necessity, obvious to every careful observer, of a recourse to federal protection under the Fourteenth Amendment, against a most unreasonable exercise by a State, of its police power, and the failure of a State Court to protect its citizens against sovereign aggression in violation of both the State and the Federal Constitutions.

The Questions Stated.

I.

Is a grant, however made, of a permit to excavate for the commercial production of rock, sand, and gravel, in a large area within a residential community which for more than twenty years immediately preceding such grant, had been continuously restricted, by zoning regulations, against such operations, and which, during said period, had been extensively developed with homes, schools, churches, parks, public recreational facilities, paved streets, and domestic utilities, an unreasonable exercise of the police power, and therefore in violation of the State and Federal Constitutions, and void, in the absence of some substantial change of conditions within that residential area which reasonably justify the zoning change?

II.

When it appears that continuously for more than twenty years, a city has encouraged the development of a residential community under zoning restrictions against operations for the commercial production of rock, sand, and gravel within said area, and under said encouragements said restricted area has been extensively developed with homes, churches, schools, parks, and public recreational facilities, etc., is the city estopped, in the absence of any substantial change in conditions within said area, to grant a permit for the conduct of such commercial operations within said residential community?

III.

Is a suit in equity the appropriate proceeding to determine the constitutional limits, and the estoppel, of the exercise of its police power by a city, when it is claimed by persons adversely affected by such action that such action is unconstitutional and void?

IV.

Do the Federal Courts have jurisdiction in a suit in equity which challenges the constitutionality, under the Fourteenth Amendment of the Federal Constitution, of an exercise by a State of its police power in the enactment of zoning regulations?

V.

In a suit in equity maintained by a person claiming to be aggrieved by an exercise of police power, is the reasonableness, and validity, of the act complained of a judicial or a legislative question, and may the Court in such a suit determine that question upon its own investigation of the facts as to the reasonableness of such action, or is it bound by the determination of such facts by the legislative body, if there is any substantial evidence before such body tending to support its determinations?

VI.

In a suit in equity which challenges the constitutionality of an exercise of police power, is it a permissible function of a Court to enjoin a threatened interference, under such exercise of police power, with a person's right to own and enjoy his property?

VII.

May persons aggrieved by an unconstitutional exercise of the police power, and by the conduct of commercial operations thereunder by a person for whose benefit such action was taken, recover damages, both actual and punitive, arising from such an invasion of his right to own and enjoy his property?

ARGUMENT.

Appellant discusses the questions involved, under seven titles. We shall reply to these in the order he has adopted.

I.

The Complaint States a Cause of Action on Federal Constitutional Grounds.

Appellant contends (His Brief pp. 7 to 16, incl.) that the complaint here does not state a cause of action, *because*:

(1) If the permit had not been granted, and Gregg had commenced these operations notwithstanding said zoning restrictions, he could not be enjoined here because no Federal question would be involved (Brief pp. 8 and 9);

(2) he, Gregg, in the circumstances last stated, could have enjoined the City from interfering with his operations (Brief pp. 8 and 9);

(3) plaintiffs cannot complain, because this variance permit does not restrict plaintiffs in the use of their own property. It merely permits Gregg to make a natural use of his own property (Brief pp. 9 and 10);

(4) a lawful use of his own property, by Gregg, does not constitute an improper exercise by the City, of its police power (Brief p. 10);

(5) plaintiffs have no right to require the City to continue to restrict the use of Gregg's land because plaintiffs have no vested right in the maintenance of those restrictions (Brief pp. 10 to 16);

(6) if the City acted unreasonably in its grant of this permit, nevertheless, such conduct would be a

matter of State cognizance only—no Federal questions would be involved (Brief p. 11); and

(7) a City is not estopped to invoke its police powers by reason of its prior enactment of other zoning ordinances (Brief p. 15).

Each of appellant's criticisms, wherein of any importance here, is unsound, and is opposed to all applicable authority.

(1) **As to the Nature of Gregg's Right to Excavate, and Its Influence on the Federal Question.**

Appellant premises his arguments upon the basic doctrine that the right to remove materials from one's own property is an *inherent* incident of ownership.

Upon this conception he postulates his conclusion (His Brief pp. 8 and 9) that the grant of the permit did not give to him any right which he did not theretofore possess, and that if he, in the absence of such a permit, had begun this excavation, he could not be enjoined here, because no Federal question would be involved.

The argument is unsound. It ignores the fact, which is *just as basic* as the inherent right to remove materials, that one's enjoyment of his property is limited (restricted) by every *reasonable* exercise of the police power. Hence we find that an owner's inherent right to remove minerals from the land he owns, *may be permanently restricted* by a reasonable exercise of the police power. (*Marblehead etc. v. City*, 36 F. (2d) 242, 47 F. (2d) 528, 76 L. Ed. 540).

This sovereign right to prohibit the exercise of one's right in the enjoyment of property, has not been judicially denied in modern times. Its exercise is limited only by a

reasonable necessity for the prohibition in furtherance of the general public welfare.

The cases cited by appellant do not deny this fundamental doctrine. Each of them holds nothing more than that, in the circumstances there presented, it was an unreasonable exercise of the police power to prohibit an owner's exercise of his inherent rights, because the general public welfare *there* did not reasonably require such prohibition.

In the circumstances pleaded in the case at bar, it cannot be said upon any authority, that the twenty year zoning policy of exclusion, under which this residential community was builded, was an unreasonable exercise of the police power in its inception, or at the time when Gregg purchased this 115 acres of land (*fifteen years after this zoning policy was adopted*), or at the time Gregg applied for and obtained this variance permit.

Indisputably, the adoption of that zoning policy whereby this community area was set apart for *residential* development, and the rock industry was excluded from it, and the continuous enforcement of that zoning exclusion for more than twenty years, was a reasonable exercise of the police power.

It necessarily follows, therefore, that at the time Gregg applied for this permit, and until he received it, he had no right to excavate this land for the production of rock aggregates. His natural right to do so, was effectually suspended by this long standing zoning policy of exclusion, which had been adopted and maintained in a reasonable exercise of the police power.

In these circumstances, Gregg's right to excavate, if he has any right, stems from the variance permit which he

applied for and obtained, and not from any natural, or inherent, right to excavate. This permit, as an exception to the general zoning policy, is the measure of his right.

If it is a reasonable exercise of the police power, for a State to encourage a substantial residential development of a community, as pleaded here, by a twenty year zoning exclusion of the rock industry from that area; and then, in the absence of any substantial change in the residential character of that community, to grant a variance permit to excavate a 115-acre tract of land in the heart of that community, to a depth of one hundred feet or more, for the commercial production of rock aggregates, then this permit is valid, and Gregg's operations under it cannot be enjoined.

But, if in the circumstances shown here, the grant of this variance permit is an unreasonable exercise of the police power, then the grant is void, and Gregg cannot excavate his land because his natural right to do so has long been, and is, effectually suspended by the twenty year zoning policy under which this community has been builded.

The question here at issue, therefore, is the *reasonableness* of this exercise of police power in the grant of this permit. This presents a judicial question which arises under the Fourteenth Amendment to the Constitution of the United States, and, under all applicable authority, is cognizable in a suit in equity, by a party aggrieved, in a Federal Court.

The power of the court to maintain the *status quo* by enjoining any operations by Gregg under this permit, until the validity of this permit, under the Fourteenth Amend-

ment to the Federal Constitution, is finally judicially determined in this suit in equity, is an inherent equitable power of the Federal Court sitting in chancery. It has never been denied. Without its exercise the full damage of State action clearly in violation of the immunities of the Federal Constitution, the supreme law of the land, could be visited upon an aggrieved party before any final preventive judgment could be obtained.

Appellant's suggestion (Brief p. 8) that if *he* had not applied for or obtained said permit, but without it he had begun the operations here complained of, he could not be enjoined *here* because no Federal question would be involved, adds nothing to a proper discussion of the case at the bar.

Here, to stop Gregg, we complain of an unreasonable exercise of the police power, an unwarranted withdrawal of zoning protection, and, incidentally, of Gregg's operations under it to our serious and permanent damage. In the case assumed by appellant, we would not complain, to stop Gregg, of any State action. *We would affirm that action*—the zoning prohibition of Gregg's operations, and, in another forum, we would seek appropriate relief.

The perfectly obvious distinction between the case here and the case assumed, is that here *we challenge* the validity of State action (a Federal question), whereas, in the case assumed, *we would affirm* the validity of State action, and under the mantle of its security we would seek appropriate relief (a State question) in the proper forum.

(2) As to Gregg's Right to Enjoin Any Enforcement of a Zoning Prohibition of Excavation Operations.

Appellant suggests (Br. pp. 8 and 9) that if he had begun to excavate his land without any permit under said zoning ordinance No. 90,500, and the city, in enforcement of said ordinance, had interfered with said operations he, Gregg, could have enjoined said city from such interference.

Appellant premises this conclusion upon his assumption that his natural right to remove these materials from his land is superior to the City's exercise of its police power in the enactment of said zoning ordinance. This, of course, as heretofore shown, is unsound. The authorities cited by appellant do not sustain appellant's position. They hold only that in the circumstances their presented zoning prohibition was an unreasonable exercise of the police power.

But, whatever the rights of the City and of Gregg *would have been*, in the circumstances assumed by Gregg, nevertheless, they are of no importance here. *The circumstances assumed have never arisen.* Gregg applied for and obtained this permit. The reasonableness of this grant *in the absence of any change in conditions*, after twenty years of zoning protection, is the question presented here. *This is a federal question.* It is not in any way impaired because in other circumstances, and in another forum, another and different question would be at issue.

(3) As to the Nature of This Variance Permit.

Appellant suggests (Br. pp. 9 and 10) that this variance permit does not restrain plaintiffs in the use of their own property but merely removes an artificial impediment to a lawful use by Gregg of his own property, and that such legislative action cannot constitute an improper exercise of the police power of the City. This argument is patently unsound.

The grant of this permit and the conduct of operations under it definitely restricts appellees in the use of their own property. The complaint pleads, as heretofore shown, that the conduct of such operations will substantially and seriously interfere with appellees comfortable enjoyment of their homes; and seriously jeopardize the health and lives of those who dwell upon appellees' properties, and will substantially, seriously, and permanently, depreciate the value of said properties. These, definitely, constitute a serious and substantial restriction upon appellees' use of their own property, and constitute a definite *pro-tanto* taking of their properties. (*Pac. Tel. & Tel. Corp. v. Eshalman*, 166 Cal. 640, 642; *People v. Ricciardi*, 23 Cal. (2d) 390, 398; *Pa. Coal Co. v. Mahon*, 260 U. S. 393, 415; *Averne, etc., v. Thatcher*, 278 N. Y. 222, 231.)

These considerations are ignored entirely by appellant in his assumptions, arguments, and conclusions. This court would not know from what Gregg says here, that his operations are in any way related to the security and future of this substantial residential community, or would in any way impair or destroy these heavy investments in homes, and in community facilities, which were made under this long zoning encouragement and protection. Yet this is the substance of this case.

(4) As to Gregg's Claim That It Is Not an Improper Exercise of Police Power to Permit His Lawful Use of His Property.

Appellant contends (his brief, p. 10) that the grant of this permit was not an improper exercise of police power inasmuch, so he says, as it does nothing more than to permit him to make a lawful use of his own property. This argument and conclusion wholly ignores the factual situation here. We have refuted it hereinbefore.

Appellant assumes that in all circumstances it is a proper exercise of police power to destroy, for the benefit of one who chooses to destroy his land, the homes, comforts, investments, and safety, of an entire community, and the inhabitants thereof, which has been builded under the encouragement of zoning regulation. A mere statement of the conditions pleaded here, and which appellant utterly ignores, demonstrates the unsoundness of his conclusion.

Were it otherwise, there would be no limit to the destruction which could be wrought by improvident public servants for the benefit of preferred interests. Investments, long encouraged, could be seriously impaired overnight, as here, and even destroyed, without any change in conditions which in common honesty and in the interest of the public welfare, as distinguished from the interest of some individual, would justify such destruction. Our society is not builded upon this concept. It is builded upon the concept that every exercise of the police power must be in furtherance of the general welfare, and that once a zoning policy has been established, and has been substantially acted upon, it may not be changed *in the absence of some substantial change in conditions to justify it*, to anyone's prejudice and detriment. (*Dobbins v. City of L. A.*, 49 L. Ed. 167; *Jardine v. City of Pasadena*, 199 Cal. 64.)

(5) As to Appellees Vested Right in the Continuance of Zoning Restrictions Upon Gregg's Property.

Appellant contends (his brief, pp. 10, 11, 13) that appellees cannot complain of the change in zoning policy which is challenged here, because appellees have no vested right to a continuance of zoning restrictions upon Gregg's property. The contention is patently unsound.

It is the law that a zoning regulation may be amended "*under new and changing conditions.*" (*Jardine v. Pas.*, 199 Cal. 64; 48 A. L. R. 509; *Miller v. Board*, 195 Cal. 477; 38 A. L. R. 1497.) But no case holds that a zoning regulation, established and substantially acted upon by the persons affected, may be changed to the detriment of those persons, in the absence of new and changing conditions which reasonably require such change in zoning regulations.

That a substantial change in conditions, is an indispensable prerequisite to any substantial change in zoning regulations, to the detriment of one affected, is the unyielding principle upon which rest the cases which uniformly deny validity to any substantial change in zoning, *in the absence of any substantial change in conditions*, if such change is detrimental to the one who has relied upon that zoning. The case of *Dobbins v. L. A.*, 49 L. Ed. 167, is a clear example, and a controlling authority, in respect of this cardinal public policy.

It is undisputed, in this record, that no change has occurred in the residential character of this community.

It is not important whether, academically defined, this right is, or is not a vested right. In any event it is a right which a person acquires by his substantial investment in a zoned district, under the encouragement and protection of a zoning regulation, and which right persists

unless, and until, a change in conditions occurs, which makes it reasonably necessary, in the interest of the public welfare, to withdraw that zoning encouragement and protection. (*Dobbins v. L. A.*, 49 L. Ed. 167; *Jardine v. City of Pasadena*, 199 Cal. 64.)

This right includes, but it is not limited to, the use which one desires to make of his own property. He may properly complain, in his assertion of this right, against any unreasonable change in the permissive use of his own property, and, with equal force, against any unreasonable change in the permissive use of another man's property in the same zonal district.

The *Dobbins* case, *supra*, is an example of the assertion of this right as against a proposed change in the permissive use of one's own property.

The cases next hereinafter cited, are examples of the assertion of this right against a proposed change in the permissive use of another man's property contained within the same zonal district. (*Jardine v. City of Pasadena*, 199 Cal. 64; *Childs v. City Planning Com.*, 79 A. C. A. 996; *Patterson v. Board of Supervisors*, 79 A. C. A. 812; *Northside etc. Assn. v. County of L. A.*, 70 Cal. App. (2d) 598, also 609; *Miller v. Board of Public Wks.*, 195 Cal. 477; *Rubin v. Bd. of Dir.*, 16 Cal. (2d) 119; *Abbey Land Co. v. City of San Mateo*, 167 Cal. 434, and *Heischelderfer v. Quinn*, 287 U. S. 345, 77 L. Ed. 331.)

In each of these cases complaint was made only as to the proposed permissive use of another man's property. The right of the complainant to make that complaint, was not challenged. This right has never been challenged in any case within our knowledge.

This constitutional right to challenge a proposed change in the permissive use of another man's property in the

same zonal district, is basic, both in its origin and in its importance. It derives from the basic constitutional principle that every man must so use his property that its use will not unreasonably interfere with another man's use of his property.

Its importance lies in the indisputable fact, that some uses of property inevitably interfere substantially with the comfortable enjoyment and use of other property within the same general district. In the circumstances where the permissive uses of all of the properties within a zonal area, are established by a zoning regulation, and any change in the permissive use of any property within that area, may vitally affect the enjoyment and value of the permissive use of each, and all, of the other properties within that zonal area, any person whose interests within that zonal area, may be adversely affected by a proposed change in the permissive use of another man's property in that zonal area, may challenge, by appropriate judicial proceedings, the reasonableness, and hence the constitutionality, of the proposed change. This is the doctrine—the necessary doctrine—of all authority.

If, in these circumstances one may not challenge a proposed change in the permissive use of another man's property, then his comfortable enjoyment and use of his own property, although not directly involved in the proposed change, could be substantially interfered with and impaired, even destroyed, by an unconstitutional excess of legislative action under the police power. Clearly, such an unreasonable limitation upon one's constitutional rights to protect his home and property against unreasonable legislative and executive action, has never been the law of America.

The cases cited by appellant are not in point. *Heischelderfer v. Quinn*, 287 U. S. 315, cited by appellant as being particularly in point, is not in point at all. It deals only with changes in the location and maintenance of public improvements. It does not deal at all with changes in the permissive uses of private properties. The situation discussed and decided has no application to the facts here.

Under the encouragement and protection of the early deed restrictions, and of a 21-year zoning restriction, this community has experienced a very substantial growth and development as a residential community. Its homes, churches, schools, parks, and supervised recreational facilities, etc., fully verify this fact.

If, as the Supreme Court of the United States held in the *Dobbins* case, *supra*, an investment of \$2500.00 under the encouragement of a zoning regulation, only a few months old, enacted by the City of Los Angeles, could not be impaired by a change in zoning without any change in conditions, then upon what ground may it be said, that the investments of these plaintiffs more than one hundred times greater, under a 21-year policy of zoning protection, may be impaired by a change in zoning without any change in conditions? It cannot be done.

It is clear, therefore, that the inhibitions of our constitutions, both state and federal, which forbid an impairment, by zoning change, of one's investments made under zoning encouragement and protection, in the absence of a change in conditions, recognize in the person affected, a substantial constitutional right which the courts are bound to respect and preserve against unnecessary and unreasonable legislative and executive invasion.

It is equally clear and fundamental, that the change in conditions which is indispensable to a change in a zoning

policy which has been substantially acted upon, must be a change in the conditions of the general area affected, and not merely a change in the fortunes or desires of one individual, or group of individuals (37 C. J., p. 734, Sec. 119; *Lawton v. Steele*, 152 L. Ed. 385, 388, 389; *I..... v. Smith*, 143 Cal. 168, 173).

(6) As to the Claim That the Constitutional Challenge Made Here Presents a Question of State Cognizance Only—That No Federal Question Is Involved.

Appellant contends (his brief, p. 11) that the validity of an unreasonable exercise of police power by a state, may be challenged only in a state forum, and that no federal question is involved. This position is unsupported by authority.

The cases are clear and numerous, which hold that an unreasonable exercise of police power by a state to the substantial detriment of a citizen violates the Fourteenth Amendment to the Federal Constitution, and may be redressed in the Federal Courts. The following cases are clear exemplars of this position: *Dobbins v. City of L. A.*, 49 L. Ed. p. 167; *Raymond v. Chicago Traction Co.*, 207 U. S. 20, 35; *Home Tel. Co. v. City of L. A.*, 227 U. S. 278; *Ex Parte Young*, 209 U. S. 123; *Snowden v. Hughes*, 321 U. S. 1; *Pennekamp v. Fla.*, 328 U. S. 331, 335; *Mugler v. Kansas*, 31 L. Ed., p. 205.

(7) As to the Estoppel of the Defendant City.

Appellant contends (his brief, p. 15) that a municipality may not be estopped to invoke its police powers by reason of its prior enactment of other zoning ordinances. This contention is unsound.

It is now established beyond doubt, and in many cases, that a governmental agency may be estopped in its exer-

cise of a governmental function. (*Times Mirror Co. v. City of L. A.*, 3 Cal. (2d) 309; *City of L. A. v. County of L. A.*, 9 Cal. (2d) 624, 630; *Farrell v. County of Placer*, 23 Cal. (2d) 624; *Garrison v. State of California*, 64 A. C. A. 973, 983.)

Equitable interference to prevent a sovereign aggression is not limited to factual precedent. In the *Times* case, *supra*, the Court said, “*Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those cases where right and justice would be defeated but for its intervention.*”

Indubitably, the undisputed facts in the case at bar demand that the City be estopped in this threatened aggression. It would be a denial of every concept of justice, right, and morality, to deny the use of the injunctive process of the Court, to prevent this threatened despoliation of this community. A sovereign who, in the absence of any change in condition, after 21 years of continuous encouragement and protection, would destroy the fruits of its bidding, is a moral bankrupt, and an outcast in the society of good government.

It is no answer to this indictment, to say that the builders of this community, and the home owners within its gates, were not encouraged to do the community building they have done, by the City's 21-year policy of zoning protection against the rock industry. The suggestion is mere sophistry, both in fact and in law.

The facts speak with undeniable conclusiveness. The founders of this community began this encouragement by deed restrictions against the rock industry. Nine years before these expired, the City declared the desirability and perpetuation of this exclusion by its 1925 ordinance. These restrictions continued until the grant of this permit on

October 2, 1946. During that long interval of protection, these plaintiffs, and many others, under the encouragement of that protection, founded their homes, schools, churches, playgrounds, and other community facilities, at tremendous expense to themselves. These things they would not have done in the absence of this encouragement, and the assurance, implied in law, that the protection would not be withdrawn in the absence of such a substantial change in conditions as would reasonably justify such withdrawal.

The law speaks with equal finality. The law says that "It is proper zoning practice to set aside a sparsely settled area near the rapidly growing City of Los Angeles for residential purposes" (Acker v. Baldwin, 18 Cal. (2d) 341, 4, 5, 6, 7); that when this is done there is an implied finding that such zoning is necessary for the Public Welfare (In re White, 195 Cal. 516, 520, 521); that

"A majority of the property owners might conceivably be content to bear the burden of taxes and other carrying charges, upon unimproved land in order to reap profit in the future from the development of the land for residential purposes. They could not safely do so without reasonable assurance that the district will remain adapted for residential use and will not be spoiled for such purpose by the intrusion of structures used for less desirable purposes. The zoning ordinance is calculated to provide such assurance to property owners in the district, and to constrain the property owners to develop their land in a manner which in the future, will prove a benefit to the City." (Averne, etc. v. Thatcher, 278 N. W. 222, 228.)

It is no answer to this indictment to say that the rock industry is a legitimate and necessary industry. Such

may be said of a commercial business; a lumber yard, and a livery stable.

But as to a commercial business, the Court in *Smith v. Collison*, 119 Cal. App. 180, 184, 186, 187, said:

“The erection of a store is not in and of itself, a nuisance, but depending upon the facts of the case, may become a nuisance if erected in a residential zoned area.

The evidence shows that the Altadena District is primarily a residential district and therefore that business and commercial establishments should be subordinate to the best interest and general welfare, of the whole district.”

As to a lumber yard, the Court said, in *Magruder v. City of Redwood*, 203 Cal. 665, 671, that:

“The objection to a lumber yard in a residence district is most obvious.”

As to a livery stable, the Court said, in the *Magruder* case, *supra*, at page 671, that:

“A person seeking for a livery stable in one of our modern cities would, as a rule, not only seek in vain, but also might subject himself to the suspicion of having just awakened from a sleep as prolonged and profound as that which made the name of Rip Van Winkle famous.”

It must be borne in mind that *a residential use is a preferred use* under our governmental scheme. In emphasis of this, the Supreme Court of California in *Ex-parte Hadachek*, 165 Cal. 416, at page 421, said:

“A business which when established, was entirely unobjectionable, may by the growth of population in the vicinity, become a source of danger to the health

and comfort of those who have come to be occupants of the surrounding territory. If the legislature should then prohibit its further conduct, the proprietor can base no complaint upon the mere fact that he has been carrying on the trade in that locality for a long period.”

It is no answer to this indictment to say that an estoppel here must fail because “fraud” is not shown.

Indisputably, “fraud” is not an essential element of an estoppel against a public body. No case holds that it is. Every case rests the estoppel upon the single basis that the action estopped, if permitted, “would defeat right and justice.”

Within our knowledge, no Court since the turn of the century, has denied an estoppel against a public body, on the ground that fraud had not been shown, where “*right and justice required an estoppel to prevent manifest wrong.*”

It is the result of the thing that is done, and not the manner of its doing, that invokes the estoppel. Neither good faith in doing a bad thing, nor bad faith in doing a good thing, can prevent or invoke, an estoppel.

This is the rule of all the cases. Necessarily this is so, because any Court would hesitate, excepting in a clear case (*like the case at bar*), to judicially declare that the public servants had acted fraudulently in the doing of a thing as to which an estoppel was invoked. But no Court would hesitate to estop such action where right and justice require it, even though the public body had acted in the best of good faith.

In the *Times Mirror Co.* case, *supra*, no one challenged the good faith of the public servants in their promises

and repudiation. Concededly, with no private axe to grind, they acted both in promise and repudiation, as they thought the public interest required. But they were estopped because, as the California Supreme Court said at page 330, that “to give the acts of this city a very limited meaning, we think its conduct in the present case, at least equivalent to an oral agreement,” which the City sought to repudiate, and that: “No Court should countenance such a thing, and an estoppel in pais will rise up in the pathway of a City to bar it and its principal, the people, from the commission of such a greivous wrong.”

This is also true of each of the cases: *City of L. A. v. County of L. A.*, *supra*; *Farrell v. County of Placer*, *supra*, and *Garrison v. State of California*, *supra*. No one claimed in those cases, that the governmental agency was estopped because of the fraud of its servants. Fraud was not an element of the estoppel successfully involved in those cases. It is not an element of the estoppel we invoke here.

The facts here *are a deadly parallel* to the facts in the *Times Mirror Co.* case, *supra*. Here, as there, the complainants were encouraged (by word of mouth there, by legislative zoning action here) to believe that if investments were made (in a commercial building there, in homes here) that these would be protected by the sovereign unless and until there should occur “some change in conditions” that, in right and justice, would justify a change in the sovereign’s policy.

Here, as there, a substantial investment was made in reliance upon the inducements of the sovereign. Upwards of \$1,500,000 during a two-year period, there.

Upwards of \$2,500,000 during a 21-year period, and of \$150,000 during the last three years of that period, here.

If, therefore, as the Supreme Court said in the *Times-Mirror* case, *supra*: “Right and justice require that the sovereign be there estopped to commit so grievous a wrong,” upon what basis may it be said that the same sovereign should not be estopped here? There is no basis for any such discrimination.”

It is important to note that Gregg made his investment in this 115 acre tract of land with full knowledge of the facts; that for 32 years the rock industry had been excluded from this community; that every attempt (and seven had been made) to mine rock aggregates in this community area, had been successfully repulsed; that during this 32-year period of encouragement and protection, homes had been built, families had been established, and churches, school, park and recreational facilities, desirable to a well rounded community, had been established, and that these contented dwellers within the gates did not want to move because John D. Gregg, a dweller without the gates, was running out of land to excavate.

Clearly, in the circumstances of this case, the choice of uses made by this sovereign 21 years ago in the enactment of its first zoning ordinance and steadfastly adhered to during the intervening years until the grant of this permit, against the officially expressed protests of the City Planning Commission, the Board of Education and the City Park and Playground Department, must remain as its choice today. Under all applicable authority, the acceptance of that choice by these people now estops this sovereign in its attempted repudiation of that choice for the benefit of John D. Gregg.

II.

Jurisdiction Here Rests Upon an Unreasonable Exercise of Police Power by a State, to the Substantial Prejudice of a Citizen, in Violation of the Fourteenth Amendment to the Federal Constitution.

Appellant contends (his brief pp. 17 to 25, incl.) that this suit is not within the jurisdiction of the Federal Court. He rests his conclusion upon five grounds:

(1) Diversity of Citizenship Is Not Shown.

The omission complained of is immaterial. Jurisdiction here, as hereinbefore shown, rests upon the presence of a Federal question, *the validity of State action*, which arises under the Fourteenth Amendment to the Federal Constitution. This jurisdiction ground is entirely independent of any diversity of citizenship, and when it is present, the diversity which is required in other circumstances, need not be pleaded or shown.

(2) Is There a Federal Question Presented?

Appellant again contends that there is no Federal question presented here. We have refuted that contention, conclusively, heretofore. But under this Point II, he approaches the question upon a somewhat different, but equally unsound, thesis.

He argues (his brief pp. 17 to 25, incl.) that the Supreme Court of California in *Wilkins v. San Bernardino*, 23 Cal. (2d) 332, 340, has held that a factual situation which properly invokes the constitutional protection, MUST FALL within one of four stated classifications; that the factual situation here is not within any of these, and therefore, no constitutional question is presented. But

that is not the holding in that case, and it is not the attitude of that Court.

In that case the Court was dealing with a specific challenge which is not the challenge presented here. It said that, in respect of the situation *there* presented, the constitutional immunity could be invoked only in one, or more, of four situations “*roughly*” defined as appellant states them. The Court did not attempt by precise definition to limit the factual precedent in which the Constitution could be invoked, to those it “*roughly*” stated. The Court did nothing more than to “*roughly*” state, *arguendo*, a general pattern within which, generally, the abuses of power of which complaint could properly be made, usually arose.

Appellant seizes upon this as dogma, and then by an attenuation which overemphasizes the importance of language in its relation to thought, concludes that the gross injustice of the sovereign aggression apparent here, is not within the broad concept of necessity upon which our founding fathers based the Fourteenth Amendment.

To know that the California Supreme Court never intended to be so misunderstood, one needs but to read what that honorable and learned Court has said in the variety of circumstances presented to it in which these constitutional guaranties have been invoked and applied. Notable among these is its statement in *Times Mirror Co. v. City of L. A.*, 3 Cal. (2d) 309, that “*equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those cases where right and justice would be defeated but for its intervention.*”

But, if appellant's conclusion were the attitude of the State Court in respect of the security afforded by the

Fourteenth Amendment, it would not impair, it would accentuate, the jurisdiction of the Federal Courts, for such has never been the attitude of the Federal Courts, as the final arbiter of federal law. This is demonstrated in the *Dobbins* case, *supra*, and in the many other cases to which we have heretofore referred.

But, even within the dogmatism of the philologist, we conceive our grievance here to be well within the pattern of the third classification stated in the *Wilkins* case, *supra*, namely:

“Where the use of adjacent property renders the land entirely unsuited to or unusable for the only purpose permitted by the ordinance.”

The complaint pleads that the use of Gregg’s property permitted by this variance permit, would substantially destroy the use of the properties of these plaintiffs for residential purposes,—*the only purpose for which they may be used under this ordinance*, and the only use to which they are adapted, because of their areas and improvement.

This unconstitutional invasion of our homes and investments, founded upon the encouragement of a twenty year zoning protection against the rock industry, is not mitigated by the assumption, or the fact, that if we chose to abandon our homes, and to apply for permission to excavate our properties for rock production, such permission would be granted. *Under the constitution we are not required to abandon our homes.* Economically, such abandonment and permission would be financial suicide.

Our properties, respectively, are too small to support any economic rock operations. We would be required to wait for a buyer until some large operator should choose to enter the field. Under conditions now obtaining and foreseeable *only Gregg would buy, and he would buy only when he chose, and only at his own price.* The creation of such a condition by zoning, is not sound governmental philosophy. It is not "*right or just.*" In such circumstances the Fourteenth Amendment commands the intervention of the court to stop the sovereign hand.

The cases cited, and relied upon, by appellant, do not support his conclusions. None of them, in any respect, indicates any disposition of any court, to deny relief in the situation pleaded here.

Appellant's suggestion that *State action* is not involved here, because we plead an unwarranted delegation by the City, of its legislative power to its common council, is wholly without merit.

The Act complained of was done by the City as an agent of the State, in the exercise of its police power. If done under an unwarranted delegation of legislative power (a State question) *nevertheless* it was done in an *unreasonable* exercise of police power (a Federal question). The State question cannot be litigated here, and that allegation may be stricken, properly, from the complaint. The learned District Judge stated that he disregarded it. But the Federal question can be litigated here, and it is the undeniable right of these plaintiffs to pursue this remedy in the Federal Courts.

(3) Does This Case Arise Under the Federal Constitution?

Appellant's contention that this case does not arise under the Federal Constitution, is unsound.

The Fourteenth Amendment prohibits any substantial interference with a citizen's right to own and enjoy property, by an *unreasonable* exercise of the police power of a State. (43 Corpus Juris, p. 308, Sec. 319; *Mugler v. Kansas*, 31 L. Ed. pp. 205 to 211; *Crowell v. Benson*, 76 L. Ed. 598, 617; *Averne v. Thatcher*, 278 N. Y. 222, 231; *Pac. Tel & Tel. Co. v. Eshelman*, 166 Cal. 640, 662, 664; *Pac. Coal Co. v. Mahon*, 260 U. S. 393, 416.)

In the circumstances pleaded here, it appears beyond all doubt that the grant of this permit was an *unreasonable* exercise of police power.

(4) Does the Grant of This Permit Constitute a Taking of Property Without Compensation?

Appellant's contention that the grant of this permit does not constitute a taking of their properties without compensation, is patently unsound. Indisputably, a license to substantially impair and to destroy the enjoyment by plaintiffs of their homes, and the value of their properties, *is a substantial interference* with the enjoyment by these plaintiffs, of their homes.

It is settled law that any *unreasonable*, and substantial, interference with an owner's enjoyment of his property, under an exercise of the police power, is a taking of property within the prohibition of the Fourteenth Amendment (*Pa. Coal Co. v. Mahon*, 260 U. S. 393, 435), and that an actionable interference with a property right, can be no different from substantial impairment of that right (*People v. Ricciardi*, 23 Cal. (2d) 390, 398), and that

even a temporary deprivation of an owner's use of his property, is a taking of his property, in violation of the constitution, both State and Federal (*Pac. Tel. & Tel. Co. v. Eshelman*, 166 Cal. 640, 642, 662, 664; *Averne v. Thatcher*, 278 N. Y. 222, 231).

Under settled law, as heretofore shown, the heavy investments in homes, and in community facilities, under the encouragement of a twenty year continuous zoning protection against the devastating influence of the rock industry, invested these plaintiffs with the right to a continuance of this zoning protection until such a change in the residential character of this community should occur, as would *reasonably* justify the withdrawal of that protection.

Under the American concept of society, *the Sovereign must be reasonable* in its encouragement and discouragement of the development and *use* of property under the exercise of its police power. *It may not encourage the development of property, and then destroy the fruits of its bidding, by a change of mind, in the absence of such a change of conditions within the area affected, as may reasonably justify the change in zoning policy* (*Dobbins v. City of L. A.*, 49 L. Ed. 167; *Dunnigan v. Dist. of Col.*, 44 F. (2d) 892, 893; *Lawton v. Steele*, 152 L. Ed. 385, 388, 389; *Jardine v. Pas.*, 199 Cal. 64; *Miller v. Board*, 195 Cal. 477; *Averne v. Thatcher*, 278 N. Y. 222, 228; *Times Mirror Co. v. City of L. A.*, 3 Cal. (2d) 309; *Pac. Tel. & Tel. Co. v. Eshelman*, 166 Cal. 640, 662, 664; 37 C. J., p. 734 Sec. 119; 48 A. L. R. 509; 38 A. L. R. 1497; *Real Properties Inc. v. Board of Appeals of Boston*, 319 Mass. 180, 65 E. (2d) 199; 168 A. L. R. (1947), p. 13).

Any *unreasonable* change of mind by a sovereign in its exercise of its police power, to the substantial detriment of a person in his enjoyment of his property, is a *pro tanto* taking of his property and, if without compensation, is in violation of the Fourteenth Amendment, and is void.

(5) Is the Alleged Controversy Genuine or Present, Under the Federal Constitution, or Is It Merely Conjectural?

Appellant contends that the controversy here is not genuine or present, but is purely conjectural, because plaintiffs do not plead any discrimination in the grant of this permit, or that the power to grant such a permit may be administered in a discriminatory manner.

This contention is of no importance in the case at bar. Plaintiffs here do not challenge the constitutionality of this grant upon the ground (as did the Milling Co. in *People v. Globe, etc.*, 211 Cal. 121, cited by appellant) that the ordinance under which this grant was made, *grants an uncontrolled discretion* to the granting authority, which might be exercised in a discriminating manner. We do not complain here of that which might be done. We complain only because Gregg has been granted such a permit.

The unreasonableness of this exercise of police power does not reside in any failure to grant more permits. It resides in the grant of this permit to seriously impair, and to destroy, our property rights, and properties, established and improved under the encouragement of a twenty year continuous zoning policy of protection against the doing of that which this grant now permits to be done.

This controversy, therefore, is genuine and present. It is not conjectural. The conduct of these permissive operations, *now going on*, constitutes a genuine, present, subsisting, daily, and substantial, interference with, and

impairment of, the health and happiness of the families of these plaintiffs, in their use and enjoyment of their homes, and a very substantial depreciation of the value of their properties, and a very definite hazard to the future safety of their properties against natural erosion into the deep and permanent pit which Gregg's operations are producing in the immediate vicinity of our properties.

The actuality of these damages has been affirmed, frequently, by the courts, and never denied within our knowledge (*McIvar v. Merced-Fraser Co.*, 76 A. C. A. 304, 20 Cal. Jur. pp. 331, 332).

The sophistry inherent in appellant's argument, is readily apparent from an examination of the map which is attached to the complaint for purposes of illustration. The map shows, and the fact is, that the area of the properties of these plaintiffs, respectively, is too small to permit of any economical mining of rock aggregates, if plaintiffs so desired, and yet, if this permit is validated, the use of these properties for homes, for which use they have been extensively and expensively developed, is practically destroyed.

In these circumstances, each of these plaintiffs is as a lamb thrown to the wolves. He cannot use the property himself. He can sell only to an operator (John D. Gregg) who can use it, and who, in these circumstances, can *buy when he chooses, and upon his own terms, and at his own price.* Experience, "*that invaluable teacher,*" teaches with bitter memories that such as the economic attitude of one circumstanced as Gregg is, in relation to our properties, if this permit is validated.

III.

The Cause of Action Pleaded Here Is Not Essentially One to Enjoin the Commission of a Nuisance by Gregg. It Is One to Invalidate an Unreasonable Exercise of Police Power by a State Agency. In These Circumstances Diversity of Citizenship Is Immaterial.

Appellant contends (his brief pp. 26 to 30, incl.) that this action is essentially one to enjoin the commission of a nuisance by the defendant Gregg, and, since diversity of citizenship is not shown, jurisdiction lies solely in the State Courts. This position is unsound. It misconceives the basic reason for *appellant's* joinder as a defendant here.

Gregg is joined as a defendant because he is engaged in doing, *to plaintiffs' irreparable injury*, that which he is permitted to do *only under* an exercise of police power that is unreasonable and void. Except for this permit, Gregg's operations are prohibited, as they have been for twenty years, by a valid exercise of police power. To prevent this interference with our constitutional rights, it is necessary (a) to challenge the constitutionality of that permit; (b) to bring before the Court wherein the challenge is made, all persons who have a direct interest in the adjudication sought, and (c) to maintain the *status quo*, by injunctive process, pending that final adjudication.

The following authorities support this joinder (*United States v. Classic*, 313 U. S. 299; Moore's Fed. Prac., Vol. 2, pp. 2135, 2157; *Talbutt v. Sec. Tr. Co.*, 22 Fed. Supp. pp. 241, 242; *Caldwell v. Taggart*, 7 L. Ed. 828; *Gregory v. Stetson*, 133 U. S. 579, 586, 33 L. Ed. 792; *Ribon v. Chi. Rd. Co.*, 21 L. Ed. 367; *Commonwealth etc. v. Smith*, 266 U. S. 152, 158, 69 L. Ed. 219; *Franz v. Buder*, 11

F. (2d) 854, 856; *Sioux etc. v. Trust Co.*, 82 Fed. 124, 126, 43 L. Ed. 628; *Texas v. Interstate Commerce Comm.*, 258 U. S. 158, 163).

In the case last cited, the Supreme Court of the United States said:

“The bill makes it plain that the carriers and employees have put the Board’s decision into effect, and have adjusted their relations on that basis. There are none to whom the controversy would be of such immediate concern as to them; and, should it be resolved against the validity of Title III and the Board’s action annulled, their interests would be directly and unavoidably affected.

“To take up and solve the controversy without their presence, and without their being represented, would be quite inadvisable, considering the exceptional nature of our original jurisdiction.”

The fact that Gregg’s operations constitute a nuisance is only incidentally involved. It is not the basis of his joinder. The fact that his interests are directly involved and affected, is the basis of his joinder. It is of no importance, therefore, to discuss the applicable rules of joinder and pleading where jurisdiction rests solely upon a nuisance which it is sought to abate.

The annexation of conditions to Gregg’s operations, as made by the Court in the State case to which these plaintiffs are *not* parties, and which were not made in the grant of this permit, although observed (*if they are*) by Gregg, is of no importance since this action does not seek primarily to abate a nuisance, but seeks primarily to void an *unreasonable* exercise of the police power of the defendant City.

However, the annexation of those conditions by the Court, emphasizes the unreasonableness of the grant which omitted them. If, as the State Court said by its action, the grant was unreasonable because these conditions were not imposed by the legislative body, then the grant was void, and, being, void, it could not be made alive by a judicial fiat which supplied the fatal omissions. The reasonableness—the validity—of this grant must be measured by the grant as made by the legislative body, and not by a grant upon conditions which have been superimposed by a court, and to which the legislative body has never given its consent.

IV.

The District Court Did Not Err in the Scope of Its Preliminary Injunction. The Restraint Imposed Is Not Greater Than Is Required to Maintain a Status Quo.

Appellant's criticism of the scope of this preliminary injunction, rests upon his erroneous assumption that dust, noise, aesthetic offense, and possible erosion, are the only injuries threatened, against which plaintiffs seek relief, and that all of these are adequately provided against by the terms of the permit, and by a judgment obtained in a case in the state court by other property owners, and, therefore, there is practically nothing complained of here, which should be preliminarily enjoined (his brief, p. 31).

There is no doubt as to the rule. An injunction, whether preliminary or permanent, should not extend beyond that which is reasonably required to protect the rights invaded.

But, a determination of the restraint reasonably required to maintain a *status quo* pending trial and judgment, rests in the sound discretion of the trial court, upon the facts preliminarily found by it, and its determination will be reversed only upon a clear showing of an abuse of discretion.

No such showing is made here. Appellant's criticism makes no mention of the permanently damaging effect of the digging of this large, deep pit upon the properties of these plaintiffs, and upon their comfortable enjoyment of their homes, and to the safety of their children.

These are pleaded by *verified* complaint, in detail. These sworn allegations are supported by the illustrative map attached to the complaint, and by the affidavits of H. B. Lynch, R. L. Farley, Jeanne Moore, and Louise Taylor [Tr. pp. 566, 568, 573, and 575].

The learned trial court was not bound to accept, as against these persuasive evidences, the meagre and wholly improbable assertions and conclusions of Mr. Gregg.

These evidences show, and every reasonable and impartial mind will affirm, that the digging of such a pit, and *its presence permanently*, will create a danger and detriment to the adjacent properties, and to the comfort, health, and safety, of the inhabitants of this community, of such gravity, and certainty, that only by prohibiting the digging of the pit can these dangers and damage be avoided.

The disadvantages to Gregg by this restraint, are as nothing compared to the disadvantages to these plaintiffs if this restraint were denied. Under this restraint GREGG RETAINS HIS ROCK materials. They are not depreciating in value. Without this restraint WE LOSE FOREVER the

comfort and safety which his operations will impair and destroy.

The attraction, and danger, of such a pit to our children of tender years, is pleaded in realistic terms and is confirmed by the vital statistics of dead and injured in the gravel pits of this valley. The fence proposed is no barrier to children.

The monetary loss to Gregg in the standby expense of equipment and organization which he acquired and builded with full knowledge that for 21 years this area had been restricted against the rock industry, and that no change in the character of this area had occurred which would justify the lifting of this restriction, is nothing compared to the loss which resides in the fears of loving parents for the safety of their children, and the interference with our comfortable enjoyment of our homes, and the heavy depreciation in our meagre lifetime savings invested in our homes, which would follow, inevitably, any lifting of this restraint.

No restraint less than a restraint against the digging of this pit, will protect our constitutional rights. Less than this will permit the destruction of these rights to our permanent damage before relief can be obtained by trial and judgment.

None of these injuries is provided against by the decree in the State case to which we are not parties. That decree provides only that certain measures will be adopted by Gregg in his operations, if and when he may be able to obtain certain materials. This record does not show that this has been done. The doing of these things, if they could be done and were done, would not remove these dangers and detriments. They would only tend to minimize them.

But always the pit, this dangerous death trap to our children, and destroyer of our peace of mind, and threat to our property, would be with us. Against these nothing but the restraint imposed can protect us. To this protection, in right and justice, we are constitutionally entitled. To deny it would be inhuman, and a grave miscarriage of justice.

Gregg knows these facts. He knows that without this restraint, his operations would demoralize this community, and, one by one, these homes, these families, would be put on the hoof, and our investments would become his, at his own price, upon his own terms, at his own time. Such is the inexorable law of industrial progress without equitable restraint.

But our homes, our families, our investments, mean nothing to Gregg. All that counts with him is the money he can make by the destruction of a community in which he does not dwell, and of which he is no constructive part. He pleads for freedom to destroy us while we defend. The inevitable fruits of that freedom would be a judgment, *a bit of paper*, solemnly declaring in the language of our founding fathers, the unalterable supremacy of *human rights over material things*, but which would stand in marked contrast to a community of homes and humans laid waste in the ruthless *unrestrained* march of industrial greed.

At pages 29 and 30 of his brief, appellant sets forth the four conditions which the State Court annexed to the permit in its effort *to make reasonable* a legislative act which, in its enactment, *the Court found was unreasonable*, and states that he has complied with these four conditions, as shown by his affidavit [Tr. *id* 1, pp. 283, 284].

The statement is not true. The four conditions which Gregg, in his affidavit, states he has complied with, are *not* the four conditions annexed by the State Court as set forth in Gregg's brief. They are the four conditions stated in the permit. *They have nothing to do with the control of dust and noise.*

Appellant's extended argument, therefore, that the learned District Court could have found, and should have found, on the basis of Gregg's affidavit, that there was no present, or reasonably prospective, danger or detriment to the health and comfort of the families of these plaintiffs, from the noise and dust created by Gregg's operations, finds no support in this record.

But, if Gregg had sworn as he could not truthfully do, that he had complied and was complying with the four conditions which the State Court found it necessary to annex to this permit, and that thereby the detriment of noise and dust had been eliminated, *nevertheless*, the District Court would not have been bound to accept, as the basis of its action, Gregg's statement as against the contrary statements of these plaintiffs under oath, and the judicial notice which a Court may take of the occurrence of such hazards as an incident to such operations (*McIvor v. Merced-Fraser Co.*, 76 A. C. A. 304).

Furthermore, appellant very carefully evades, in his discussion of this question, any reference to the detriments, *permanent in their nature*, which would flow from the presence in the heart of this residential community, of a pit one hundred feet, or more, in depth, with steep banks of loose material, and covering one hundred acres, or more, of land.

As alleged in plaintiffs' complaint, the process of digging such a pit, and its perpetuation permanently, would

very substantially depreciate, and in many instances, destroy the value of plaintiffs' property. It would create and constitute a permanent threat to destroy some substantial portions of plaintiffs properties, by the natural processes of erosion. It would create, and perpetuate, a permanent attraction and danger to the children of this community, as the vital statistics of our City confirm in respect of comparable situations.

The fact and force of these destructive conditions, no man may deny. Their ruinous influence upon a residential development and use of property is inescapably obvious, and the learned District Court did not err in enjoining their occurrence until this case could be tried upon its merits. To have denied this preliminary relief would have been a grievous miscarriage of justice, and a clear denial of the constitutional immunities guaranteed to these plaintiffs against *an unreasonable interference* with their enjoyment of their homes and investments.

It should be remembered that Gregg purchased this property at a time when it was restricted, and for more than fifteen years had been restricted, against the rock industry, under a zoning encouragement for the development of this community area as a residential community area. He knew, when he purchased this land, that this small community area, under that zoning encouragement and protection, had been improved with homes, churches, schools, parks, and other community facilities, and that the people of this area, and the Planning Commission; Board of Education; Park and Playground Department,

and teachers in the schools, were opposed to any encroachment of the rock industry.

In these circumstances, Gregg cannot plead for sympathy when denied the right to despoil this community for his personal monetary gain. Our homes are the most precious units in our society. Our children are the most valuable of our natural resources. It is the fundamental philosophy of the American way of life, that when the security of these conflicts with mere money making, the latter must yield (ex parte Hadachek, 165 Cal. 416, 421). Upon the perpetuation of this doctrine rests the safety of our Republic.

The cases cited by appellant do not support his criticism. Each of them recognizes the supremacy of human welfare over mere money making. In *People v. Hawley*, 207 Cal. 395, cited by appellant, at page 31 of his brief, the Court recognized the necessity for prohibiting an operation which “*might be objectionable to others.*”

In re Smith, 143 Cal. 368, cited by appellant at page 32 of his brief, the Court said that it was proper to regulate industry in respect of “*the places thereof.*”

Similarly, it will be observed that in each of the other cases cited, the Court was careful to observe, that a prohibition of industry is proper to the extent reasonably necessary to prevent interference with the health and welfare of the people in the community.

The injunction appealed from does not go beyond the limits of permissible judicial interference with industry for the preservation of homes.

V.

In the Circumstances Pleaded, the City Is Estopped to Grant This Permit, and Gregg Is Estopped to Exercise the Privilege It Purports to Confer.

Appellant again argues (his brief pp. 38 to 46, incl.) that the City may not be estopped in the exercise of its police power, and that if it could be estopped, relief must be sought in the State Courts.

Hereinbefore, we have shown, conclusively, that the sovereign may be estopped whenever "*right and justice*" demand it, and that equity has not yet cast all the molds into which the facts of any given case must fit, in order to invoke this doctrine.

Appellant seems unable, or unwilling, to grasp the import of the complaint here. He insists upon measuring the nature of this action, and the jurisdiction of the Court, by reference to only *four* of the *forty-six* paragraphs of the complaint (his brief p. 1). He views the remaining *forty-two* paragraphs as merely vague and obscure matters of inducement which lead up to an allegation of a conclusion of law, namely, that the City is estopped to grant, and Gregg is estopped to enjoy, this permit (his brief p. 38).

Thus, blinded by his unwillingness to see, he concludes that there is no estoppel pleaded, which arises by record, by deed, or by matter *in pais*, and, hence, no estoppel at all.

In this he is unsound. The complaint here is a simple complaint in equity. It rests upon the fundamental American doctrine that "*whenever right and justice require it,*" the sovereign will be estopped in the exercise of

its governmental functions to the substantial detriment of its subjects.

The complaint pleads, in chronological order, the natural adaptability in every respect, of this community area for *residential* development and use; the early recognition (1914) of this natural adaptability, by the owners who subdivided it for *residential* development and use, and, by deed restrictions, excluded the rock industry for the next twenty years; the early recognition (1925) of this residential adaptability and development, by the defendant City, and its choice, then made, to encourage a continuing *residential* development of this area by zoning classification, and the exclusion of the rock industry from it; the acceptance of this encouragement by a very heavy investment in homes; churches; schools; parks and playgrounds; paved streets, and other incidents of good community building, during the period of twenty-one years which intervened between the enactment of the first zoning ordinance (1925) and the grant of this permit (1946).

The complaint pleads that the residential character of this community was preserved, *it did not change*, until the grant of this permit, and that, *excepting for this permit*, the residential character of this community would continue, and expand, but that, if this permit is validated, the homes, community facilities, and heavy investments, that have been builded and made under that sovereign's encouragement of residential development for more than twenty years, will be practically destroyed.

The complaint concludes by alleging in general terms, that in the circumstances of this encouragement and acceptance, and *the utter absence of any substantial change in the residential character of this community*, it is an unreasonable exercise of its police power for the defendant

City to suddenly change its mind, and to permit the destruction of the natural fruits of its bidding—this splendid residential community, by the grant of this permit to excavate this one hundred and fifteen acre tract of land.

In these circumstances, and many more are pleaded, the complaint alleges that “*right and justice require*” that the City be estopped to grant, and that Gregg be estopped from enjoying, this permit.

Were it desired (it is not necessary) to relate this character of estoppel to some standard definition in the law, clearly, it may be denominated an “*estoppel in pais.*” The facts pleaded bear a direct relation to each of the six elements of such an estoppel as stated in appellant’s brief at page 40.

It is not necessary, however, that this appear. It is sufficient to show an *invitation, acceptance, and repudiation* without any change in circumstances, to the detriment of the citizen, to invoke the protection of the Fourteenth Amendment.

This is the rule of all of the cases, of which *Dobbins v. City of Los Angeles, supra*, is an exemplar—the relief granted is not affected by the name by which it is designated. Sometimes it is referred to as relief by estoppel, and sometimes it is referred to as relief by an injunctive process which strikes a dead limb from a legislative tree.

Significantly, appellant does not mention either the facts pleaded, or the law evidenced by a host of authorities, both text and case, which command the relief we seek. *Appellant is entirely familiar with these facts and with this law.* His failure to meet them, and his setting up of a straw man case, is the patent admission of a defeatist.

He cannot meet them. Confessedly, upon the full record here, the action of the learned District Court, of which appellant here complains, is unimpeachable.

Appellant entirely misconceives the purpose of our pleading of the facts which antedated the first zoning ordinance. We did not plead the early setting aside of this area for residential development, or the early restrictions by deed against the rock industry as something binding upon the City. We pleaded these only for the purpose of showing that the "*choice of use*" of the land within this area, as made by the City in 1925, *was a reasonable choice*, and served the best interests of the general public welfare, and that, since this was true then, *it remained true* through the long period of zoning protection, and it was true when this permit was granted, because the residential character of this community had not changed. That which we claim is binding upon the City now, is *the choice it then made*,—not the facts upon which that choice was based, and which made that choice a reasonable one, *then and now*.

Appellant fears that the supremacy of "*right and justice*" over whimsical changes of mind, or unreasonable preferment of an individual or of a class, in governmental affairs, may lead to a freezing of a zoning plan in the mold in which it was first cast, is unreal. If after a zoning plan has been adopted, such a change occurs in any area affected, that "*right and justice*" justify a change in the zoning plan, then, within the doctrine which we in-

voke, a reasonable change in zoning may be made. There is *no freezing*. But, if no such change in conditions occurs, then there cannot be any change in zoning to the prejudice of those who have acted, substantially, upon the encouragement and protection of that zoning, without compensation is made. In these circumstances “*right and justice*” command that the Sovereign, having made its choice, abide by that choice, unless compensation is made to those whose property would be adversely affected by the change. This is the doctrine of the *Dobbins* case, *supra*, and of the many other cases, both State and Federal, hereinbefore cited. *There is no authority to the contrary.*

Appellant argues that there cannot be any estoppel here, because the City, lifting itself by its boot straps, provided in its charter that it could amend or repeal its zoning ordinances, and that since we are presumed to know the law, we are bound by the City’s charter reservation as the law.

The answer is obvious. The constitution and not the charter is the supreme law of the land. *The constitution is the law we are presumed to know.* The constitution says, as witness the *Dobbins* case, *supra*, that there can be no change in zoning policy without a justifying change in conditions, to the *detriment* of those affected. This constitutional limitation upon sovereign power cannot be evaded by a City by the expedient of adopting a charter which says it may do as it chooses. *The constitution is still there, and it is supreme.*

VI.

Is the Legislative Exercise of the Police Power
Immune to Judicial Review?

Appellant suggests (his brief, pp. 26 to 50, incl.) that an act of a legislative body in the exercise of its police power, is immune to judicial review. This is contrary to all applicable authority.

Appellant's argument here confuses a challenge to the *motives* of a legislative body in the exercise of its police power, with a challenge to the *reasonableness* of its action. Concededly, the "*motives*" of a legislative body, as distinguished from the "*reasonableness*" of its action, are not open to challenge in any court except in some exceptional circumstances not present here.

But, the "*reasonableness*" of an exercise of police power is always open to challenge, and, when challenged, the question presented is a *judicial* question which the court will hear and determine *upon its own responsibility*, and *upon its own record*, and *the facts adduced before it*. *This is settled law.*

In *Mugler v. Kansas*, 31 L. Ed. 205, 211, 220, the Supreme Court of the United States said:

"The courts must obey the constitution rather than the law making department of government, and must upon their own responsibility, determine whether, in any particular case, these limits have been passed.

"The 14th Amendment to the Federal Constitution forbids any arbitrary deprivation of life, or liberty, and the arbitrary spoliation of property.

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at

liberty—indeed under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority.

“If, therefore, a statute purporting to have been enacted to protect the public morals, or the public health, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.

“We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights, requires that the federal court should determine such an issue upon its own record, and the facts adduced before it.”

In 5 Cal. Jur. Sec. 122, p. 719, the rule is stated to be:

“If a statute purporting to have been enacted to preserve public health, morals, and safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court to so adjudge, and thereby give effect to the Constitution. If this were not so, as has been well said, the constitutional guarantees of the personal right to liberty and property would be wholly subject to the will of the majority acting through the legislature.”

In *Crowell v. Benson*, 76 L. Ed. 598, 618, the Supreme Court of the United States, said:

“In the present instance the argument that the Congress has constituted the deputy commissioner a fact finding tribunal, is unavailing, as the contention makes the untenable assumption that the constitutional

courts may be deprived in all cases of this determination of facts upon evidence even though a constitutional right may be involved.

“In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions both of fact and law, necessary to the performance of that supreme function. The case of confiscation is illustrative. The ultimate conclusion almost invariably depending upon the decisions of questions of fact. This court has held the owners to be entitled to a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts.”

In *Ruben v. Board*, 16 Cal. (2d) 119, at page 126, the Supreme Court of California, said:

“The finality of the board of directors’ determination does not bar the respondents from asserting in a judicial proceeding that the zoning law is unconstitutional as applied to their property.

“Although the same type of evidence may be used in that proceeding as was presented to the zoning committee and board of directors in support of the application to secure the variance, the issues are not the same and its denial is not res judicata upon the constitutional question.”

In *In re Hall*, 50 Cal. App. 786, 790, the Court said:

“When the boundary has been plainly passed, the duty of the court to repel the encroachment and so uphold the constitution, is absolute. It has no discretion in the matter.”

In *In re Junqua*, 10 Cal. App. 602, 603, the Court said:

“And where it appears, either upon its face or from competent evidence extrinsic to the measure itself, that such regulation is unjustly oppressive or unreasonably burdensome in the restrictions prescribed or the conditions it imposes, it will be held void as violative of the constitutional guaranties of the citizens, for the doctrine, once maintained by the courts, that where an ordinance is reasonably within a proper consideration of and for the public health, safety and comfort, a court will not disturb the legislative act, upon the theory that the legislature has investigated and found the facts of which it has predicated the measure, which constitutes a legislative judgment with reference thereto which is final and conclusive upon the court, has been exploded, at least in this State.”

These authorities are clear and controlling. They refute, utterly, appellant's contention.

In *Abbey Land Co. v. San Mateo*, 167 Cal. 437, the Supreme Court of California, said:

“The court will have to regard all the circumstances of the particular city or corporation, the objects sought to be attained, and the necessity which exists for the ordinance.”

Appellant's argument confuses the vital difference in the permissible scope of review in a proceeding in mandamus or certiorari, and in a suit in equity.

This is *not* a proceeding either in mandamus or in certiorari. *It is a suit in equity.* All controlling authority, as heretofore shown, is clear, positive and uniform, in the statement of the rule that in a suit in equity, where the constitutionality of the exercise of the police power,

or an estoppel, is presented for determination, the questions presented are *judicial* questions, and that in their determination it is the right and the duty of the Court to exercise its own independent judgment upon both the law and the facts, upon its own independent and full judicial investigation.

It is unmistakably clear, therefore, that when the reasonableness of an exercise of the legislative function under the police power is presented to the Court, as a judicial question in a suit in equity, the Court does not function on a basis of equality with the legislative agency. It functions as a judicial agency *that is constitutionally superior* to the legislative agency, in respect of that determination.

VII.

In Accepting Jurisdiction the District Court Did Not Err Either Under the Judicial Code, or the Doctrine of Comity.

Appellant's criticism of the District Court, in accepting jurisdiction here, rests upon two obvious fallacies. These are (1) that these plaintiffs, in substance, previously invoked the jurisdiction of the State Court for the relief they seek here, and are bound to pursue that remedy exclusively, and (2) that these plaintiffs, if entitled to the relief they seek, can obtain that relief, presumably in that pending state case (his brief, pp. 51 to 62, incl.).

As to the Parties in Interest in the Pending State Case.

None of the plaintiffs here is, or ever has been, a party to the pending State case.

Notwithstanding this fact, this appellant states (his brief, p. 52, line 7) that "*it is apparent that the real parties*

in interest are identical in both suits.” This is the genesis of his criticism.

But, *the undeniable conclusion* is that the plaintiffs *here* and the plaintiffs *there*, are not identical either in fact or in law—since these plaintiffs are not, *in fact*, plaintiffs in the State case, this appellant states that they are, *in law*, plaintiffs in the State case because the plaintiffs in the State case pleaded that the State action was begun on behalf of “*all others similarly situated.*”

But, *it is settled law*, that such a pleading does not bring in, as parties plaintiff, any person who, although similarly situated, does not join in the action, or accept the benefits of the action (*In Matter Cent. Irr. Dist.*, 117 Cal. 382, 388; *Haese v. Heitzig*, 159 Cal. 569, 573, 574; *Compton v. Jessup*, 68 Fed. 263; *Ex Parte Howard*, 19 L. Ed. 634; *Freeman on Judgments*, Vol. 1, pp. 952, 956). Under these authorities, the “*class action*” rule which applies in some jurisdictions, *does not apply in California.*

There is not, and cannot be, any showing here that any of these plaintiffs ever accepted any of the benefits of the pending State case. As a matter of fact, up to the present time, no benefits have accrued in the State case even to those who are parties plaintiff therein.

Appellant’s criticism, therefore, is unavailing. Its dignity is not greater than the error from which it stems.

As to the Relief Which the Plaintiffs Here Could Obtain in the State Case.

Indisputably, the parties plaintiff here cannot apply for, or obtain, any relief in the pending State case to which they are not parties either in fact or in law.

Furthermore, *if they were* parties plaintiff in the pending State case, they could not obtain in that case the pre-

ventive relief they seek here to maintain a *status quo* pending a final determination of the validity of the permit challenged there and here.

This is true because in the State case there was no restraint at the time of judgment and appeal, and in those circumstances, the Appellate Courts in California have no jurisdiction to enjoin Gregg's operations pending the appeal in that case (*Hicks v. Michael*, 15 Cal. 107; *Napa etc. v. Calistoga*, 174 Cal. 411; *McCann v. Union Bk.*, 4 Cal. (2d) 24, 27; *Seltzer v. Musicians, etc.*, 12 Cal. (2d) 718, 719; *Canavaris v. Theatres, etc.*, 15 Cal. (2d) 495, 500; *Oklahoma Gas Co. v. Russell*, 261 U. S. 293).

For the reasons above stated the doctrine of comity does not apply. This is the clear holding of the cases hereinabove cited, and of *Merced Dredging Co. v. Merced County*, 67 Fed. Supp. pp. 598, 605, where the Court said:

“Rules of comity or convenience, must give way to constitutional rights, and when the case presented is one where a federal court of equity should intervene, it will not hesitate to do so.”

Upon the record here, it is a necessary conclusion that these plaintiffs are not precluded from pursuing their remedy in the federal court for a violation of their immunities under the Fourteenth Amendment, simply because *other persons aggrieved*, as to their properties, by the same unconstitutional exercise of the police power, have pursued, and are pursuing a remedy in the State Court. The plaintiffs here are not required to hazard their constitutional rights upon the outcome of a case to which they are not parties; in the prosecution of which they have no voice; in which they cannot apply for, or obtain, any personal relief, and which is being prosecuted in a jurisdiction they did not select.

Assuming that these plaintiffs could have pursued in the State Court, the remedy they seek here, nevertheless, they were not bound to do so (*Porter v. Inv. Synd.*, 286 U. S. 471, 76 L. Ed. 1226; *Bacon v. Rutland R. R. Co.*, 232 U. S. 134).

The good judgment of these plaintiffs in seeking their remedy in a Federal Court for a violation by the State of their rights under the Federal Constitution, instead of pursuing their alternative remedy in the courts of the State whose agency violated their federal constitutional rights, is fully demonstrated by the marked contrast in what has happened to date to the plaintiffs in the State case, and what has happened to date to the plaintiffs in this case. Without this intervention of the District Court in this case, these plaintiffs, and all others similarly aggrieved, would be irreparably ruined before any relief could otherwise be obtained.

It is appropriate that we should here record our profound conviction that the *Appellate* Courts of the State of California, upon the pending appeal in the State case, will vindicate the Judiciary of that State by declaring void, under both the State and the Federal constitutions, the unreasonable exercise of the police power of that State under challenge there and here.

The learned Judge of the *trial* court in the State case, bottomed his decision against the plaintiffs in that case upon the wholly untenable thesis that (1) it is almost impossible to prove an estoppel against a public body, without proof of actual fraud; (2) a person cannot acquire a vested right as to another man's use of his own property; (3) a Court may not annul a legislative act where a question of policy is involved; (4) if there was any evidence of substance, before the City Council in re-

spect of this grant, then the findings of the Council are final, and binding upon the Court, however much the Court might believe that the grant was inexpedient, inadvisable, and unnecessary; (5) it would be an arrogance of the judiciary, and an unwarranted usurpation of power in regard to an equal department of the government, for a Court to set aside a determination of a legislative body, in the presence of contradictory evidence of substance before that legislative body, and (6) if the matter before the legislative body is a subject of legitimate debate, then the Court is without power to do anything in regard to the act.

Hereinbefore, we respectfully submit, we have demonstrated that each of these six concepts is erroneous. In brief recapitulation we remind the Court that:

(1) Fraud is not an essential element of an estoppel *in pais* against a governmental body. No case holds that it is. All of the cases rest its invocation upon the unfairness of the action, regardless of intent, whether express or implied, and estop the public body where “*justice and right require it.*” The effect, and not the cause, of the action complained of, determines the estoppel.

(2) The “right” which one man has under a zoning regulation, in respect of another man’s use of his own property in the zonal district, is a substantial right. Whether “vested” or not, under academic definition, it is, nevertheless, entirely sufficient as a basis for his challenge to the constitutionality of a proposed change in the permissive use of the other man’s property *in the absence of a substantial change in conditions*, and, also, for him to compel the other man’s obedience to the zoning restrictions in respect of the use of his property.

(3) All legislation involves, in some degree, a determination of policy by the legislative body. But this determination of policy does not bar—it provokes—judicial interference when the policy as determined passes beyond the constitutional limits of the policy making function.

(4) The theory of finality has long since been “exploded” as the law in California in a proceeding (which this is) which challenges the constitutionality of legislative action (*In re Junqua*, 10 Cal. App. 602, 603). The theory of finality applies only in proceedings in mandamus and certiorari (*which this is not*). In a challenge to the *constitutionality* of an legislative act, *it is the duty of the Court* to make its own independent determination of both law and fact, upon its own independent judicial investigation and record.

(5) The performance of its sworn constitutional duty to measure a legislative act with its constitutional limitations, and to annul that act when it exceeds those limitations, *is not* an “*arrogance of the judiciary.*” A failure or refusal to perform that duty *is an “abdication of judicial duty”*, and is a violation of an individual’s sacred constitutional right. In respect of the exercise of this *supreme function*, the legislative and judicial branches of our government are not equal. *The judicial branch is superior and supreme.*

(6) The legislative body is not *omnipotent* (*Ex parte Whitwell*, 96 Cal. 73, 77). The nature, and extent of the evidence, and *whether there is any evidence at all*, before the legislative body, *is wholly immaterial* in a suit in equity which challenges the *reasonableness—constitutionality—*of the legislative act, and invokes an estoppel against that act. The legislative body is not required to say *why* it enacted any particular legislation under attack. It is for the Court

to say, in the exercise of its *supreme judicial function*, not *why* the legislative action was taken, but *whether* the action taken was within the constitutional limits of legislative power (*Mugler v. Kansas*, 31 L. Ed. 205, 211; *In re Hall*, 5 Cal. App. 786, 790; *Abbey Land Co. v. San Mateo*, 167 Cal. 437; *Crowell v. Benson*, 76 L. Ed. 598; *In re Junqua*, 10 Cal. App. 602).

Conclusion.

In conclusion, we respectfully submit that the complaint here pleads a strong and compelling case for equitable relief under the Fourteenth Amendment to the Federal Constitution; that the question presented is a federal question cognizable in the Federal Courts; that the action pending in the State Courts upon behalf of persons who are not parties to this action, and to which the plaintiffs here are not parties either in fact or in law, does not bar or suspend the jurisdiction of the court in this case; that the preliminary injunction here appealed from is not broader in its scope than is reasonably required by the exigencies of the case at bar, and that the learned Chancellor of the District Court did not err in granting this preventive relief to maintain a *status quo* until trial and judgment upon the merits.

It must be remembered that the applicable rule is that “*where the questions presented by an application for a preliminary injunction are grave, and the injury to the moving party will be certain and irreparable, if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to the other party, even if the final decree be in his favor, will be considerably less, the injunction will be granted* (Ohio Oil Co. v. Conway, 279 U. S. 813, 815; 73 L. Ed. 972).”

In its grant of the Preliminary Injunction here appealed from, the learned District Court did nothing more than to exercise the power conferred, and to perform the plain duty imposed, upon that Court by the Constitution and the laws of the United States (*Thornton v. Rose Imp. Dist. No. 1*, 291 Fed. Rep. 518).

The power and the duty of the Court has been clearly defined and vigorously asserted by the Supreme Court of California, in the recent case (1946), of *In re Porterfield*, 28 Cal. (2d) 91, where, speaking at page 103, the Court said:

“We unequivocally recognize and affirm that it is the duty of courts to be most vigilant and vigorous in protecting individuals, as well as minority and majority groups, against encroachment upon their fundamental liberties. Those freedoms are vastly more consequential than any object to be attained by business or professional regulations, and the integrity of the former is not to be compromised to save the latter.”

The principle of the unalterable supremacy of the home and the family over material gain, must be frozen in the workaday philosophy of our Republic, lest it perish from the earth.

We respectfully submit that the order appealed from should be affirmed.

OLIVER O. CLARK,

ROBERT A. SMITH,

Attorneys for Appellees.

2518
No. 11861

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. D. GREGG,

Appellant,

vs.

HENRY WALLACE WINCHESTER, ERNEST JOSEPH STEWART, *et al.*,

Appellees.

APPELLANT'S REPLY BRIEF.

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

SEP 10 1948

PAUL P. O'BRIEN,
CLERK

DONALD J. DUNNE,
215 West Seventh Street, Los Angeles 14,
WOOD, CRUMP, ROGERS, ARNDT & EVANS,
458 South Spring Street, Los Angeles 13,
Attorneys for Appellant.

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APPELLANT'S REPLY BRIEF.

Preliminary Statement.

Appellant will not undertake to specifically answer each of the points argued by Appellees in their brief for the reason that all such arguments were anticipated and are completely refuted by Appellant's Opening Brief and it would unnecessarily lengthen this Reply Brief to re-argue.

I.

The Authorities Cited by Appellees Do Not Support Their Contentions.

A perusal of the cases cited by Appellees discloses that they do not support the contentions of Appellees. For instance, on page 28, it is argued that the granting of the Conditional Use Permit to Gregg constituted a taking

of Appellees' property, citing *Pacific Tel. & Tel. Corp. v. Eshleman*, 166 Cal. 640. But the case cited has nothing to do with the exercise of the police power in zoning matters. It is, rather, concerned with the taking of property by eminent domain proceedings.

Appellees also cite *People v. Ricciardi*, 23 Cal. 2d 390. That was also a condemnation case and merely held that interference with ingress and egress to a person's property arising by construction of a highway was a taking of property for which such property owner was entitled to damages.

Again, on page 29, Appellees cite the case of *Dobbins v. City of Los Angeles*, 41 L. Ed. 167, as authority for the proposition that once zoning has been established it may not be changed in the absence of some substantial change in conditions to justify it, to anyone's prejudice and detriment. That case does not so hold. In that case plaintiff Dobbins purchased property located in an area in which it was permissible to erect a gas works. Thereafter Dobbins expended a substantial sum of money in commencing the construction of a gas works. Whereupon, the City Council amended the ordinance so as to include the Dobbins property within an area in which such business was prohibited. The Court merely held that "Being the owner of the land and having partially erected the works, the plaintiff in error had acquired property rights, and was entitled to protection against unconstitutional encroachments which would have the effect to deprive her of her property without due process of law." The *Dobbins* case did not hold that a property owner has a vested right in the zoning of any property other than his own. It was the reverse of the situation in the case at bar.

It did not hold that a property owner has a vested right to prevent the use of property other than his own for any lawful purpose which might be permitted by governmental authority. That case did not hold that a municipality cannot issue a Conditional Use Permit authorizing a property owner to use *his own property* for a lawful purpose. The theory of the *Dobbins* case was simply the well established rule by which existing non-conforming uses are exempted from subsequent zoning which would have the effect of preventing the continuance of such existing non-conforming use. There is no such point involved in the case at bar and the *Dobbins* case is not authority in support of any of Appellees' theories.

Appellees also cite the case of *Jardine v. City of Pasadena*, 199 Cal. 64. In that case the Court simply held that a municipality has the right from time to time to change its zoning ordinances and that it is immaterial if the consequence of such rezoning is that the value of surrounding land for residential purposes might be depreciated. It held that such possibility did not deprive the municipality of the exercise of its police power.

Other cases cited by Appellees include *Childs v. City Planning Com.*, 79 A. C. A. 996; *Patterson v. Board of Supervisors*, 79 A. C. A. 812; *Northside etc. Assn. v. County of L. A.*, 70 Cal. App. 2d 598, also, 609; *Miller v. Board of Public Wks.*, 195 Cal. 477; *Rubin v. Bd. of Dir.*, 16 Cal. 2d 119; *Abbey Land Co. v. City of San Mateo*, 167 Cal. 434, and *Heischelderfer v. Quinn*, 287 U. S. 345, 77 L. Ed. 331. Those cases are cited by Appellees as examples of their contention that adjacent property owners have a right to prevent a change in the zoning of their neighbor's property. An examination of

the cases cited discloses that they all hold merely that the Court will not substitute its judgment for the discretion vested by law in the municipal body acting in a quasi-judicial capacity in connection with the exercise of the police power in zoning matters.

The *Reichelderfer* case, *supra* (erroneously cited by Appellees as Heischelderfer) specifically holds that an adjoining property owner has no such right. A quotation from that decision is set forth at some length commencing at page 1 of the Appendix to *Appellant's* Opening Brief. In fact, all of the above cases cited by Appellees have been cited and quoted by Appellant in his Opening Brief as authority in support of *Appellant's* contentions. A reference to those cases discloses quite clearly that they do not support Appellees' contentions but are quite the opposite.

Without referring in detail to each of the other cases cited by Appellees, it suffices to say that an examination of each of the cases reveals that *none of them is authority for any of Appellees' contentions*. For instance, in six different places in Appellees' Brief they cite the case of *Times-Mirror Company v. City of Los Angeles*, 3 Cal. 2d 309, in support of the proposition that a City may be estopped in the exercise of its police power.

A reading of that case discloses that there is no similarity between the facts in that case and the facts in the case at bar.

Appellant believes that the application of the *Times-Mirror* case must be strictly limited to the peculiar facts out of which it arose, and that it is not an authority on the question of estoppel with reference to the exer-

cising by the municipality of its police powers in zoning matters. A reading of the *Times-Mirror* case reveals that the decision is based more on a theory of quasi-contractual relationship than it is upon a theory of equitable estoppel. That decision reveals that pursuant to a plan for the development of the Los Angeles Civic Center, the City and County agreed to acquire several parcels of land then held in private ownership, and further agreed with the State of California that if the latter would erect a new State Building at the place where it is now located, that the City and County would by purchase or by condemnation proceedings acquire the building and property of the *Times-Mirror Co.*, then located on the northeast corner of First and Broadway, and would cause title to the property to pass to the State of California. Resolutions were adopted by the Board of Supervisors and by the City Council, resolving "that the City of Los Angeles proceed under eminent domain with the acquisition of the properties . . ." The City and *Times-Mirror Co.* were unable to agree by negotiation to a valuation to be set upon its property, and condemnation proceedings were thereafter instituted by the City of Los Angeles. The sole issue in these proceedings was the value of the property and the price to be paid by the City of Los Angeles. No other issue was raised. A judgment was entered fixing the valuation, and the City of Los Angeles deposited in Court the amount of the judgment. An appeal was taken by the *Times-Mirror Co.*, solely on the question of damages, and the judgment of the trial court in that regard was reversed by the Supreme Court, which ordered the case retried solely on the question of damages.

In the interim, the Times-Mirror Co. in reliance upon the resolutions adopted by the City Council and the Board of Supervisors, and in reliance upon the condemnation proceedings and the interlocutory judgment entered therein, had purchased the property at the corner of First and Spring Streets and had erected thereon at great cost the building which is now occupied by it. Meanwhile, the State of California, likewise in reliance upon the agreements with the City and County, had erected the new State Building. Thereafter and before the retrial of the case on the question of damages, the City of Los Angeles attempted to dismiss the proceedings and abandon said condemnation. Application was made to the Supreme Court for a writ of mandate to compel the Superior Court to proceed with the trial of the case. Such a writ was issued, the Supreme Court holding that because of the unusual circumstances of the case and the agreements and understandings by the City of Los Angeles and the County of Los Angeles and the State of California with reference to the development of the Civic Center, and with the Times-Mirror Co. with regard to the acquisition of its property, and the reliance by both the Times-Mirror Co. and the State of California upon such agreements that the City was estopped to dismiss the action.

Thus, it will be seen that the facts of that case are fully distinguishable from the case at bar, and that the theory of a quasi-contractual relationship, which was the basis of the decision of the *Times-Mirror* case, has no application under the facts of the case at bar.

The police power of a municipality cannot be bartered away even by express contract. (*Maguire v. Reardon*, 41 Cal. App. 596, 602.)

There is no doubt that the general rule is that estoppels will not be invoked against the government or its agencies except in rare and unusual circumstances. (*Aebli v. Board of Education*, 62 Cal. App. 2d 706, 729.) No such circumstances are here presented.

Again, we respectfully submit that the police power of the municipality with reference to zoning regulations cannot be usurped by the private individual under a set of facts as revealed by the record in the case at bar, and that if such a doctrine were recognized, it would lead to the inevitable result that all zoning regulations must remain static in the mold of the first zoning ordinance enacted. This is neither the spirit nor the intent of the law, and should be rejected.

There can be in the nature of things no vested right in an existing law which precludes its change or repeal; nor can there be a vested right in the omission of the governing body to legislate on a particular subject. In no case is there an implied promise on the part of the government to protect its citizens against incidental injury occasioned by changes in the law. Every citizen, in making his arrangements in reliance upon the continued existence of laws, takes upon himself the risk of their being changed, and the government incurs no responsibility nor can there be any estoppel arising in consequence of any such change causing incidental injury to the private interests of a citizen. (*Middleton v. Texas Power and Light Company*, 249 U. S. 152, 63 L. Ed. 527; *E. Saginaw Co. v. E. Saginaw*, 19 Mich. 259.)

II.

In Accepting Jurisdiction the District Court Erred Both Under the Provisions of Section 265 of the Judicial Code (28 U. S. C. A. 379) and Under the Doctrine of Comity.

Appellant in his Opening Brief (pp. 51-62), contended that the District Court should have declined to take jurisdiction because of a prior suit which had been brought in the Superior Court of the State of California in and for the County of Los Angeles by twenty-six plaintiffs acting in their own behalf and also on behalf of all others similarly situated. The State action involved the identical subject matter as the case at bar.

It is Appellant's contention that the State suit was a representative suit and that the Appellees in the case at bar, being of the class represented are bound by the judgment of the State Court. Therefore, the District Court under the doctrine of comity should have declined jurisdiction. This matter is argued at some length in Appellant's Opening Brief supported by citations of authority and it is not therefore necessary to re-argue the matter here.

However, in view of the fact that Appellees refuse to concede that the State action was a representative suit and that the judgment therein is binding upon Appellees, we wish to invite the attention of the Court to the case of *Rodman v. Rogers*, 109 F. 2d 520, in which the Circuit Court of Appeals, Sixth Circuit, considered this identical question and decided against Appellees' contention. In so doing, the Court stated:

“This is an appeal from an order of the District Court dismissing appellants' petition on the ground

that an earlier decision by a Kentucky court was an adjudication of all the rights of the parties hereto. In November, 1936, Joseph H. Gibson and eleven other property owners brought suit in the Circuit Court of Jefferson County, Kentucky, against Ralph Rogers, doing business as the Louisville Crushed Stone Company, to restrain him from injuring their property by shooting blasts of dynamite or other explosives in the operation of his limestone quarry. Each of the plaintiffs in that suit resided within one thousand feet of the quarry. An injunction issued permanently restraining Rogers from discharging blasts of any explosive that would injure the property of any of the plaintiffs or interfere with the comfortable and reasonable enjoyment of their homes, and that injunction was sustained by the Court of Appeals of Kentucky. See *Rogers v. Gibson, et al.*, 267 Ky. 32, 101 S. W. 2d 200.

“In March, 1937, the same plaintiffs filed a motion in the same court alleging that Rogers had violated the injunction. The court held otherwise, and in due time that decision was affirmed. See *Gibson v. Rogers*, 270 Ky. 159, 109 S. W. 2d 402.

“On April 17, 1937, Rogers moved the appointment of a commissioner to go upon his quarry property, observe the loading of all blasts, and particularly the amount of explosive used in each, and the time of shooting it. This motion was opposed by the plaintiffs in the former proceedings, but the Court appointed one Edward P. Voll as commissioner and directed him to make bi-weekly reports upon his observations. His appointment is still in effect, and he has rendered detailed reports as ordered.

“In May, 1937, Rogers incorporated under the law of Delaware as The Louisville Crushed Stone Company, Inc.

“The plaintiffs herein, a different set of property owners, filed this suit on July 28, 1938. All of them live in the vicinity of appellee’s quarry, not nearer than 3,700 feet thereto and northeasterly thereof, instead of southwesterly, as did the plaintiffs in the suit in the state court. They allege herein a continuance of explosions and the same types of consequent injury as were alleged in the first suit. In addition, they allege injury in several respects resulting from the clouds of dust and noise with which the air is filled in consequence of the operation of a rock crusher, a metal screen for sorting the crushed rock, a mechanical loading device and trucks. But they allege that, during all of said times’—from the beginning of the quarry operations to the filing of the bill—these devices have been operated with the injurious consequences aforesaid; and they prayed that appellees be permanently enjoined from so injuring their property.

“The District Court sustained appellees’ plea that the judgment in the state court was *res judicata* as to all matters alleged by appellants.

“Appellants contend that there is no such identity of parties or cause of action as will support the District Court’s order.

“With this contention we cannot agree.

“When one succeeds to the interest of another against whom an injunction has issued and has knowledge of the terms of the injunction, he is as much bound by it as was the other against whom it issued. *State v. Will*, 86 Kan. 561, 121 P. 362; Cf. *Rivera*

et al. v. Lawton, 1 Cir., 35 F. 2d 823; *C. & C. Merriam Co. v. Saalfield*, 6 Cir., 190 F. 927; *Zip Mfg. Co. v. Pep Mfg. Co.*, 6 Cir., 27 F. 2d 219. Hence, Rogers' incorporation as The Louisville Crushed Stone Company, Inc., and the transfer of his quarry property are of no consequence in so far as the issue of *res judicata* is concerned. The corporation is bound by the injunction to the same extent as is Rogers.

“Nor is it of consequence as contended by appellants, that none of the nominal parties plaintiff in the first suit is a plaintiff herein. When property owners are similarly injured by a nuisance, they constitute a class, and, if one or more of them is designated to act for the class in bringing a suit to abate the nuisance, a judgment rendered therein is binding upon the class. *Smith v. Swarmstedt*, 16 How. 288, 14 L. Ed. 942; *McIntosh v. City of Pittsburg, C. C.*, 112 F. 705, *Cf. Barrett v. Vreeland*, 168 Ky. 171, 182 S. W. 605. Appellees alleged in their plea in abatement that appellants herein conferred with and selected the plaintiffs in the first suit because their properties were nearest to the quarry, and they further allege that appellants assisted and supported plaintiffs in the maintenance of the first suit. These facts being undenied and only their legal sufficiency questioned, we conclude that appellants' interests were adjudicated in the first suit. See *Hopkins v. Jones*, 193 Ky. 281, 235 S. W. 754.

“But appellants urge that the complaint and injunction in the first suit were limited to blasting and the

consequent injuries to their properties, such as the cracking of plastering, foundations and sidewalks, and such vibration or shaking of their homes as interfered with the comfortable or reasonable enjoyment thereof, whereas the complaint in this suit adds to the foregoing the operation of the rock crusher, screening and loading devices and trucks, with such consequent filling of the air with dust and noise as injures their property and interferes unreasonably with its comfortable enjoyment. Not only do appellants not claim that the operation of these devices is new, but they allege that from the beginning these devices have been thus operated to their injury; they merely add here the annoyances of dust and noise, which could have been included in the first suit.

“One may not split a cause of action and bring separate suits upon its parts; a judgment is *res judicata* not only as to such elements of a cause of action as were actually litigated but as to those which might have been determined as well. *Baltimore Steamship Co. v. Phillips*, 274 U. S. 316, 47 S. Ct. 600, 71 L. Ed. 1069; *Davis, Trustee v. Mabee*, 6 Cir., 32 F. 2d 502; *Nolan v. City of Owensboro*, 6 Cir., 75 F. 2d 375; *Dern v. Tanner*, 9 Cir., 96 F. 2d 401; *Brunn v. Hansen*, 9 Cir., 103 F. 2d 685. *Cf. United States v. California & Oregon Land Co.*, 192 U. S. 355, 24 S. Ct. 266, 48 L. Ed. 476.

“Appellants have argued that, because the judgment of the Kentucky court was *in personam*, as distinguished from *in rem*, the federal court was not precluded from taking jurisdiction in this case, and

appellees have contended that the state court acquired jurisdiction of the *res* by the appointment of its special commissioner to report upon appellee's blasting operations.

"It is unnecessary to consider either of these contentions, since the doctrine of *res judicata* is applicable and controlling whether the judgment in the first case was *in personam* or *in rem*.

"The order of the District Court is affirmed."

The attention of the Court is invited to the fact that the complaint in the State case involved herein alleges that the action was being brought on behalf of the named plaintiffs "and all others similarly situated on whose behalf this action is also begun and is maintained." [Tr. Vol. II, p. 351, fol. 130]. Furthermore, the affidavit of J. D. Gregg in opposition to the application for preliminary injunction alleges as follows:

"That affiant is informed and believes and therefore alleges the fact to be that the real parties in interest in Superior Court Case No. 522031 and the real parties in interest in the within action No. 7765-PH are one and the same and that both of said actions have been and now are being prosecuted for the benefit of the same persons." [Tr. Vol. I, p. 287.]

This allegation in Mr. Gregg's affidavit is not denied according to the record.

It is also significant that the plaintiffs in both the State suit and in this suit are represented by the same counsel and the fact that the complaint in this suit [Tr.

Vol. I, pp. 40 to 44, incl.] names all of the plaintiffs in the State suits as owners of property in the vicinity of the Gregg land who are affected by the subject matter of the action.

We respectfully submit that the facts in the *Rodman* case, *supra*, are identical with the facts in the case at bar and that the District Court should not have accepted jurisdiction. It, therefore, follows that the issuance of a preliminary injunction was an abuse of discretion.

Respectfully submitted,

DONALD J. DUNNE and
WOOD, CRUMP, ROGERS, ARNDT & EVANS,
Attorneys for Appellant.

NOTE: A typographical error in Appellant's Opening Brief has come to our attention. On page 62 the language "abused its discrimination in granting a preliminary injunction" should be "abused its discretion in granting a preliminary injunction."

No. 11,861

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. D. GREGG,

Appellant,

vs.

HENRY WALLACE WINCHESTER, ERNEST JOSEPH STEW-
ART, *et al.*,

Appellees.

APPELLEES' PETITION FOR REHEARING.

OLIVER O. CLARK,
710 Knickerbocker Building, Los Angeles 14,
Attorney for Petitioning Appellees.

FILED

MAR 16 1949

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No. 11,861

IN THE

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ART, *et al.*,

Appellees.

APPELLEES' PETITION FOR REHEARING.

*To the Honorable Ninth Circuit Court of Appeals of the
United States of America, and to Each of the Judges
Thereof:*

The appellees herein respectfully petition for a rehearing of the above entitled cause, and in support thereof, respectfully represent as follows:

An opinion of this Honorable Court was filed herein on February 14, 1949.

Your petitioners believe, and earnestly represent, that said opinion misconceives the factual situation upon which rests the application of the doctrine of comity invoked in the case at bar, and that by reason thereof an erroneous conclusion has been reached.

It is significant that in its invocation and application of this doctrine of comity, this Honorable Court has not mentioned the controlling facts, and the state law which, we believe, preclude the application of the rule invoked. We believe and urge that even though this Honorable Court may adhere to its announced conclusion, it ought nevertheless to make appropriate reference to the omitted elements, and set forth clearly the basis upon which their importance is disregarded, and the conclusion reached is determined.

I.

The Rule of Comity Upon Which This Opinion Rests Does Not Apply, Because in California the Doctrine of Class Actions Which Obtains in Many Jurisdictions, and in the Federal Courts, Is Not Recognized in the Circumstances of This Case.

The opinion of this Honorable Court rests upon the assumption that appellees, under the "class action" rule, are parties to a case prosecuted in the courts of the State of California by other aggrieved persons in which relief is sought against the zoning action here complained of.

This assumption as to the applicatoin of the "class action" rule is clearly erroneous. The rule invoked by this Honorable Court obtains in many jurisdictions and in the Federal Courts but it does not apply in California.

In California no one is bound in such an action who does not join in the action unless he accepts the benefits thereof. This record is devoid of any showing necessary to bring these appellees within this rule.

We cited the authorities in our brief, at pages 68 to 70 inclusive, which sustain this position. These authorities were not answered in the reply brief of appellants here and are not referred to in the opinion of this Honorable Court.

Each of the authorities relied upon by this Honorable Court in its invocation of this doctrine of comity deals either with the law of a state which recognizes the class action rule, which the State of California does not recognize, or with the rule which applies in the Federal Courts. None of them sustains the proposition that where the parties seeking a remedy under the Federal Constitution in a federal forum, are not parties, either actual, or fictional, under the "class action" rule, in a case being prosecuted in the state courts, they are to be denied their remedy in a federal court because of the pendency of the state case.

We find nothing either in the cases relied upon by this Honorable Court or elsewhere which supports the proposition that relief must be denied in a federal forum to a person who is not a party, as under the California rule these appellees are not, to a case prosecuted by other parties in a state tribunal seeking relief against a common source of injury.

II.

The Relief Which These Appellees Seek Here Cannot Be Obtained by Them in the Pending Case in the Courts of California, Because Under the Rule of Parties Which Obtains in California, They Are Not Parties to That Case, and in Addition Thereto, the State Court Is Without Jurisdiction to Maintain the Status Quo Until the Ultimate Disposition of the Case.

In our brief at pages 68 to 70 inclusive we made the showing supported by authority that in the pending state case the injunctive relief sought here by appellees could not be granted even though these appellees were actually made parties to that case.

These authorities have not been answered either in appellant's brief or in the opinion of this Honorable Court.

We respectfully submit that it would be manifestly unjust to deny appellees the relief they seek here when the relief sought could not be obtained in the pending state case brought by other parties.

We believe and urge that the opinion of this Honorable Court is subject to the criticism of the dissenting opinion in 87 Lawyers Edition, page 1442, where it is said that "*The opinion of the court cuts deeply into our judicial fabric. The duty of the judiciary is to exercise the jurisdiction which Congress has conferred.*"

III.

The Res of This Action and of the State Action Referred to Is Not the Same. It Is Different as to Each Property Owner.

We submit that this Honorable Court errs in its assumption that the *res* in this action is the same as the *res* in the pending state case. Clearly the right of each of these appellees is derived from the fact of his ownership of real property which may be injuriously affected by an unreasonable exercise of police power. It may well occur that as to one or more but less than all of the property owners involved in the two suits, the zoning action complained of would be an unreasonable and therefore void exercise of the police power because of its unreasonable interference with the enjoyment of the properties respectively of such persons, and yet as to all other property owners the zoning action complained of would be good.

It cannot be said, therefore, in any real or legal sense that the *res* in the two actions is the same. In these circumstances it is not proper for this Court to refuse jurisdiction at the instance of a property owner who may be circumstanced differently than another property owner. His complaint against the zoning power may be good, although the complaint of other property owners may be bad.

It has never been the rule or the practice, except in clear cases, to deny to any person his day in the Court of his own choice where the enjoyment of his own real property is at stake, simply because the owner of some other real property is seeking in another forum the same relief in respect of his individual property.

The actual and recognized dissimilarities in parcels of real properties, distinguishes any case in which they con-

stitute the *res*, from the property involved in what is known as the "common fund" cases. Here there is no "common fund," and there are no properties identically situated or affected in identically the same manner in respect of the zoning action complained of.

Conclusion.

In conclusion, we respectfully submit that this petition should be granted and that upon a rehearing this Honorable Court should hold that because of the minority rule of "class actions" which obtains in California, these appellees are not to be denied their right to pursue their equitable remedy here simply because of the pendency of another case by other parties in the courts of the State of California, and that there is not such an absolute identity and similarity in the *res* in this action (the individual properties of these individual appellees) and the *res* in said state action as to preclude the prosecution of this suit.

The proposition presented here is of utmost importance. It vitally affects the constitutional rights and remedies of these appellees. If the door of the Federal Court is closed to them, it means that they are without remedy to maintain a *status quo* until the ultimate determination of the validity of said zoning action, because they are not, and cannot be required to be, and cannot be, parties either actually or fictionally to the pending state case.

We respectfully submit that this petition should be granted.

OLIVER O. CLARK,
Attorney for Petitioning Appellees.

Certificate of Counsel.

I, Oliver O. Clark, counsel for petitioning Appellees in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

OLIVER O. CLARK,

Attorney for Petitioner.

No. 11864

United States
Circuit Court of Appeals
For the Ninth Circuit.

RECONSTRUCTION FINANCE CORPORATION, a corporation,

Appellant,

vs.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED
APR 24 1948

PAUL P. O'BRIEN,
CLERK

No. 11864

United States
Circuit Court of Appeals

For the Ninth Circuit.

RECONSTRUCTION FINANCE CORPORATION, a corporation,

Appellant,

vs.

SPOKANE, PORTLAND AND SEATTLE
RAILWAY COMPANY, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

DEWEY H. PALMER,
501 U. S. National Bank Bldg.,
Portland, Oregon,
For Appellant.

HART, SPENCER, McCULLOCH &
ROCKWOOD,

CHARLES A. HART,
MANLEY B. STRAYER,
Room 1410 Yeon Bldg.,
Portland, Oregon,
For Appellee.

District Court of the United States
for the District of Oregon

Civil No. 2764

SPOKANE, PORTLAND AND SEATTLE
RAILWAY COMPANY, a corporation,
Plaintiff,

vs.

DEFENSE SUPPLIES CORPORATION,
a corporation,
Defendant.

COMPLAINT

Now Comes Plaintiff and for Its Cause of Action
Herein alleges as follows:

First Cause of Action

I.

Plaintiff is a corporation organized and existing under the laws of the State of Washington and is engaged in the transportation of persons and property by railroad in interstate commerce under the provisions of the Act to Regulate Commerce and Amendments thereto. With connecting carriers, its railroad forms a through line for interstate railroad transportation between New Orleans, Louisiana, and North Portland, Oregon.

II.

Defendant is a corporation organized and existing under the laws of the United States.

III.

On April 14, 1943, defendant caused to be delivered to a connecting carrier of plaintiff at New Orleans, Louisiana, eleven carloads, and on April 15, 1943, one carload, of alcohol for transportation over the lines of plaintiff and its connecting carriers to North Portland, Oregon. Said shipments were duly [1*] accepted for such transportation by said initial carrier and were thereupon transported by said connecting carriers and plaintiff to destination at North Portland, Oregon, where delivery was made in accordance with shipping directions theretofore given by defendant. A statement showing the complete detail of said twelve shipments is annexed hereto marked "Exhibit A" and hereby made a part of this complaint.

IV.

Under the tariffs duly filed and published by plaintiff and its connecting carriers, the lawful charges for transporting such shipments from said point of origin to destination was \$7474.74. Defendant has paid on account of said charges the sum of \$6170.39, and there remains due from defendant to plaintiff on account of said transportation charges the sum of \$1304.35, which said sum defendant has failed and refused and continues to fail and refuse to pay.

Second Cause of Action

I.

Plaintiff is a corporation organized and existing under the laws of the State of Washington and is

*Page numbering appearing at foot of page of original certified Transcript of Record.

engaged in the transportation of persons and property by railroad in interstate commerce under the provisions of the Act to Regulate Commerce and amendments thereto. With connecting carriers, its railroad forms a through line for interstate railroad transportation between New Orleans and Harvey, Louisiana, and Portland and Eugene, Oregon, and Seattle and Pasco, Washington.

II.

Defendant is a corporation organized and existing under the laws of the United States.

III.

Between April 14, 1943, and April 22, 1943, defendant caused to be delivered to a connecting carrier of plaintiff at New Orleans and Harvey, Louisiana, thirty-three carloads of alcohol for transportation over the lines of plaintiff and its connecting carriers to Portland, Oregon, Eugene, Oregon, Seattle, Washington, and Pasco, Washington. Said shipments were duly accepted for such transportation by said initial carrier and were thereupon transported by said connecting carriers and plaintiff to said destinations where delivery was made in accordance with shipping directions theretofore given by defendant. A statement showing the complete detail of said thirty-three shipments is annexed hereto marked "Exhibit B" and hereby made a part of this complaint.

IV.

Under the tariffs duly filed and published by plaintiff and its connecting carriers, the lawful

charges for transporting such shipments from said points of origin to destination, and for accessorial transportation service, was \$24,053.32. Defendant has paid on account of said charges the sum of \$11,212.58, and there remains due from defendant to plaintiff on account of said transportation charges the sum of \$12,840.74, which said sum defendant has failed and refused and continues to fail and refuse to pay.

Wherefore, plaintiff demands judgment against defendant in the sum of \$1304.35 on its first cause of action, and in the sum of \$12,840.74 on its second cause of action, and for costs and its disbursements herein.

CHARLES A. HART,
Attorney for Plaintiff. [3]

State of Oregon,
County of Multnomah—ss.

I, A. J. Witchel, being first duly sworn, depose and say:

I am secretary of Spokane, Portland and Seattle Railway Company, plaintiff above named; that I have read the foregoing complaint, know the contents thereof, and the same is true as I verily believe.

A. J. WITCHEL.

Subscribed and sworn to before me this 24th day of April, 1945.

[Seal] CAROLINE EVANS,
Notary Public for Oregon.

My commission expires March 17, 1948.

[Endorsed]: Filed April 25, 1945. [4]

[Title of District Court and Cause.]

**ORDER TO SUBSTITUTE NAME OF
DEFENDANT**

Plaintiff appearing by Mr. Hugh L. Biggs, of counsel, defendant by Mr. Dewey Palmer, of counsel. Whereupon, upon oral motion of the plaintiff,

It Is Ordered that the Reconstruction Finance Corporation be substituted as defendant herein in place of the Defense Supplies Corporation. [10]

October 8, 1945.

In the District Court of the United States
for the District of Oregon

Civil No. 2764

**SPOKANE, PORTLAND AND SEATTLE
RAILWAY COMPANY**, a corporation,
Plaintiff,

vs.

**RECONSTRUCTION FINANCE
CORPORATION**, a corporation,
Defendant.

**FIRST AMENDED ANSWER AND
COUNTERCLAIM**

Comes now the Defendant, Reconstruction Finance Corporation, and files the following answer and counterclaim as its first amended answer herein :

Answering First Cause of Action

I.

Defendant admits the allegations stated in Paragraphs I and II in the first cause of action of the complaint.

II.

Defendant admits that twelve carloads of alcohol were transported by the Plaintiff as stated in Paragraph III in said first cause of action, and that the Defendant paid the Plaintiff \$6170.39 computed at the rate of \$1.23 as set forth in Exhibit A attached to and made a part of said complaint, but Defendant denies each and every other allegation in said Paragraph III.

III.

Defendant admits that it has paid the sum of \$6170.39 to the Plaintiff and that it has refused to pay any additional sum and denies each and every other allegation in Paragraph IV of said cause of action.

IV.

Defendant denies each and every allegation in the complaint not herein admitted, controverted or specifically denied.

For a first further separate and distinct defense thereto, Defendant alleges: [16]

I.

Defendant, Reconstruction Finance Corporation, is an instrumentality of the United States, created by Act of Congress on January 22, 1932 (15 USCA 601-617). That all of its capital stock is owned by the United States.

II.

Defense Supplies Corporation was created and organized by Reconstruction Finance Corporation pursuant to authority of the Act of Congress of June 25, 1940, (15 USCA 606b-3) as an instrumentality of the United States in order to aid the Government in its national defense program and for the purpose of producing, acquiring, carrying, selling, or otherwise dealing in strategic and critical materials as defined by the President, and of purchasing and producing supplies for the manufacture of strategic and critical materials and other articles and supplies necessary to the national defense; and Defense Supplies Corporation was so existing and acting at all times stated in the complaint.

III.

By authority of Public Law 109, 79th Congress, approved June 30, 1945, Defense Supplies Corporation was dissolved, effective July 1, 1945, and all of its functions, powers, duties and authority were transferred, together with all its documents, books of account, records, assets and liabilities of every kind and nature, to Reconstruction Finance Corporation, to be performed, exercised and administered by the latter corporation in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation.

IV.

By order of this Court, subsequent to the filing of the complaint, Reconstruction Finance Corporation has been substituted as defendant for the originally-named defendant, Defense Supplies Corporation.

V.

That all of the alcohol shipments set forth in the complaint were "tax-free" transportation of alcohol by the United States Government; that the duly filed tariff rate applicable to said transportation is \$1.23 per cwt. less appropriate applicable land-grant percentage deductions. [17]

Answering Second Cause of Action

I.

Defendant admits the allegations stated in Paragraphs I and II in the second cause of action in the complaint.

II.

Defendant admits that thirty-three carloads of alcohol were transported as stated in Paragraph III in the second cause of action and that defendant paid to plaintiff \$11,212.58 and denies each and every other allegation in said Paragraph III.

III.

Defendant admits that it has paid the sum of \$11,212.58 to plaintiff and has refused to pay any additional sum and denies each and every other allegation in Paragraph IV of said cause of action.

IV.

Defendant denies each and every allegation in the complaint not herein admitted, controverted or specifically denied.

For a first further separate and distinct defense thereto, defendant alleges:

I.

Defendant re-alleges all the allegations contained in Paragraphs I, II, III and IV of the first further separate defense to the said first cause of action.

II.

That all of the alcohol shipments set forth in the complaint were "tax-free" transportation of alcohol by the United States Government; that the duly filed tariff rate applicable to said transportation is \$1.23 per cwt. less land-grant percentage deductions as hereinafter set forth.

III.

That all said shipments are entitled to land-grant percentage deduction from the said tariff rate of \$1.23, so that the net rate that may be lawfully charged for transportation of said alcohol is \$0.6665. The land-grant rate is applicable herein for the reasons that all of said alcohol was purchased and acquired by the [18] said Defense Supplies Corporation prior to the transportation thereof as alleged in the complaint and was owned by and was the property of the Defense Supplies Corporation at all of the times mentioned therein; that the alcohol was at all times mentioned in the complaint defined by the President of the United States as a strategic and critical material; that the alcohol was so purchased, acquired and caused to be transported by the Defense Supplies Corporation on the recommendation and request of the War Production Board and for the sole and exclusive purpose of furthering the defense program of the United States

Government in time of war; that the purchase, acquiring and transportation of the alcohol in question was necessary for military and naval uses of the United States; that said alcohol was military and naval property of the United States within the meaning of Section 321 of the Transportation Act of 1940 and that said shipments and the transportation thereof were movements for military and naval and not for civilian use within the meaning of said section; that said shipments were made over railroads which were aided in their construction by grants of land under land-grant acts and that the charges for said transportation at the rates and on the tariffs alleged and referred to hereinabove were subject to land-grant deductions as provided by law.

COUNTERCLAIM

For a counterclaim to the first cause of action in the complaint, defendant alleges:

I.

Defendant refers to and hereby incorporates as fully as though here repeated Paragraphs I, II, III, IV and V of the first further separate defense to the said first cause of action, and Paragraph I of the first cause of action of the complaint.

II.

On April 14, 1943, Defense Supplies Corporation caused to be delivered by a connecting carrier of plaintiff at New Orleans, Louisiana, eleven carloads and on April 15, 1943, one carload of alcohol

for transportation over the lines of plaintiff and its connecting carriers to North Portland, Oregon. Said shipments are the same transportation services as set forth in the first cause of action in the complaint.

That said alcohol was purchased and acquired and caused to be transported by Defense Supplies Corporation on the recommendation and request of the War Production Board and for the sole and exclusive purpose of furthering the defense program of the United States Government in time of war; that the purchase, acquiring and [19] transportation of the said alcohol was necessary for military and naval uses of the United States; that said alcohol was military and naval property of the United States within the meaning of Section 321 of the Transportation Act of 1940 and that said shipments and the transportation thereof were movements for military and naval and not for civilian use within the meaning of said section; that said shipments were made over railroads which were aided in their construction by grants of land under land-grant acts and that the charges for said transportation as hereinbelow mentioned were subject to land-grant deductions as provided by law.

The specific movement of the alcohol involved in this action was accomplished at the order of the Treasury Department Procurement Division of the United States Government on a freight-prepaid basis from the Defense Supplies Corporation, as consignor, to the War Shipping Administration, as principal for the Soviet Government Purchasing

Commission. All of said alcohol was transported to the Soviet Union under Lend-Lease Agreement between the United States Government and the Soviet Government. Said arrangement between the Treasury Department and Defense Supplies Corporation provided that the transportation charges herein involved were to be paid initially by the Defense Supplies Corporation and reimbursed to the Defense Supplies Corporation upon presentation of invoices to the Treasury Department of the United States Government.

Under the tariffs duly filed and published by plaintiff and its connecting carriers, the lawful charges for transportation, for the public at large, of the said shipments of alcohol were \$6170.39; that the defendant was entitled to land-grant deduction therefrom in the sum of \$2826.08. Notwithstanding the right of defendant to having said sum of \$2826.08 deducted as aforesaid, the plaintiff demanded and received payment from defendant said sum of \$6170.39.

III.

Defendant duly filed a claim against the plaintiff for said overcharge, and the plaintiff notified defendant in writing dated March 9, 1944, that said claim was denied. The claim set forth herein is for recovery of charges with respect to the same transportation service set forth in the first cause of action in the complaint and arises out of the subject matter of said cause of action.

Plaintiff has failed and refused and continues to fail and refuse to pay [20] said sum of \$2826.08 to the defendant.

Wherefore, the defendant prays judgment against the plaintiff in the sum of \$2826.08, together with interest and costs, and that the complaint of the plaintiff be dismissed with costs to the defendant.

/s/ DEWEY H. PALMER,

Of Attorneys for Defendant.

[Endorsed]: Filed Apr. 30, 1946. [21]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This cause came on regularly for pre-trial before the Honorable James Alger Fee, District Judge, on October 14(F), 1947. Plaintiff was represented by Manley B. Strayer, of its attorneys, and defendant, Reconstruction Finance Corporation, was represented by Dewey H. Palmer, of its attorneys.

Based on the proceedings had at said pre-trial hearing.

It Is Ordered, that the following matters are admitted as to the issues framed by the complaint herein and the answers and counterclaims thereto:

I.

1. Plaintiff is a corporation organized and existing under the laws of the State of Washington and is engaged in the transportation of persons and property by railroad in interstate commerce under the provisions of the Act to Regulate Commerce and

amendments thereto. With connecting carriers, the railroad forms a through-line for interstate railroad transportation between New Orleans and Harvey, Louisiana, and North Portland, Portland and Eugene, Oregon, and Seattle and Pasco, Washington.

2. Defense Supplies Corporation was, during all of the times hereinafter mentioned prior to July 1, 1945, a corporation duly created by the Reconstruction Finance Corporation at the request of the Federal Loan Administrator with approval of the President, pursuant to authority contained in Section 5d of the Reconstruction [37] Finance Act, as amended, with its principal office in Washington, D. C. By authority of Public Law 109, 79th Congress, Defense Supplies Corporation was dissolved effective July 1, 1945, and all of its functions, powers, duties and authority were transferred to Reconstruction Finance Corporation, to be performed, exercised and administered by the latter corporation in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation. Reconstruction Finance Corporation is an instrumentality of the United States Government, created by Act of Congress on January 22nd, 1942. All of its capital stock is owned by the United States. At all of the times hereinafter mentioned the Defense Supplies Corporation and/or its successor as aforesaid, the Reconstruction Finance Corporation, did and now does business and had and now has an agent and representative in Portland, in the District of Oregon.

3. The first cause of action in this case involves the transportation of 12 carloads of alcohol over the lines of plaintiff and its connecting carriers to North Portland, Oregon. The second cause of action in this case involves the transportation of 33 carloads of alcohol over the lines of plaintiff and its connecting carriers to Portland, Oregon, Eugene, Oregon, Seattle, Washington, and Pasco, Washington. A permissive counterclaim by the defendant Reconstruction Finance Corporation herein involves the transportation of 54 carloads of alcohol delivered to Illinois Central Railroad Company for transportation to Portland, Oregon. All of said alcohol was shipped from New Orleans and Harvey, Louisiana.

4. Each of the carriers participating in said transportation was at all times herein mentioned a party to and participated in the tariff or tariffs specifying the rate or rates for transportation of ethyl alcohol from New Orleans and Harvey, Louisiana, to the above mentioned destinations. Said tariffs and the rates specified therein were duly published and filed with the Interstate Commerce Commission, as required by the provisions of Section 6 of Part I of the Interstate [38] Commerce Act, and were in legal effect at the time when the shipments were made.

5. Said shipments involved in the first and second cause of action were billed and forwarded "charges collect" and Defense Supplies Corporation, claiming that the rate on the alcohol should be \$1.23 cwt. in accordance with Item 1563 of Trans-

continental Freight Bureau West-Bound Tariff No. 4-T due to the alcohol being tax free paid the said 1.23 rate. The plaintiff, claiming that the applicable rate was Item 1497 of said tariff, accepted the amounts so paid by the Defense Supplies Corporation under protest as part payments only.

6. The tariff rates properly applicable to said shipments were subject to land-grant deductions in accordance with the formula that has been applied by the defendant to all the transportation involved in this case, since the alcohol was owned by Defense Supplies Corporation at the time of said transportation and was shipped to the Soviet Union under Lend Lease Agreement between the United States and the Soviet Government for use by the Army of the Soviet Union in the manufacture of explosives and synthetic rubber. All of said alcohol was transported under an arrangement between the Treasury Department and Defense Supplies Corporation whereby the charges were to be paid initially by the Defense Supplies Corporation and reimbursed to the Defense Supplies Corporation upon presentation of invoices to the Treasury Department of the United States Government.

7. If Item 1563 of the Transcontinental Freight Bureau West-Bound Tariff No. 4-T (1.23 cwt.) is applicable, the defendant, Reconstruction Finance Corporation is entitled to recover from the plaintiff, the Spokane, Portland & Seattle Railway Company, the sum of \$2,826.08 in the first cause of action herein, but if Item 1497 of said tariff is the appli-

cable rate (1.49 cwt.) then the defendant is entitled to recover from the plaintiff in the first cause of action the sum [39] of \$2,119.12.

8. Defendant, Reconstruction Finance Corporation, is entitled to recover from the plaintiff, Spokane, Portland & Seattle Railway Company, the sum of \$311.28 on the second cause of action herein if Item 1563 of Transcontinental Freight Bureau West-Bound Tariff No. 4-T (1.23 cwt.) is applicable, but if item 1497 of said tariff is applicable then the plaintiff is entitled to recover from the defendant the sum of \$1865.96 in said second cause of action.

9. On June 14, 1943 to and including June 23, 1943 the Defense Supplies Corporation caused to be delivered to Illinois Central Railroad Company at New Orleans, Louisiana, 54 carloads of ethyl alcohol for prepaid transportation to Portland, Oregon. The Defense Supplies Corporation paid the Illinois Central Railroad Company the sum of \$31,921.68 as transportation charges thereon. The Defense Supplies Corporation filed a claim for overcharges in the sum of \$17,681.92 against the Illinois Central Railroad Company, based upon the same matters as are claimed herein with respect to the first and second causes of action, a copy of which claim is attached hereto and marked Exhibit A and made a part hereof. Said claim was disallowed by the Illinois Central Railroad Company in written notices of such disallowances addressed to Defense Supplies Corporation dated April 30,

1946, with respect to its claim for land grant deductions and letter dated May 14, 1946, with respect to its claim that Item 1563 of the Transcontinental Freight Bureau West-Bound Tariff 4-T was applicable instead of Item 1497 of said tariff. The defendant has counterclaimed herein against the plaintiff for said sum of \$17,681.92. Only nine of said cars were transported by plaintiff from Pasco, Washington, to Portland, Oregon, pursuant to said contract of carriage. If item 1563 of Transcontinental Freight Bureau West-Bound Tariff No. 4-T (1.16 cwt.) is applicable, defendant is entitled to recover from plaintiff the sum of \$3012.82; but if item 1497 of said [40] tariff is applicable, defendant is entitled to recover from plaintiff the sum of \$2489.93 on said counterclaim. Defendant reserves the right to assert against Illinois Central Railroad Company or its connecting carriers its claim for refund on the remainder of said 54 cars.

It Is Further Ordered, that the contested issues to be submitted to the Court for determination in connection with the issues framed by this pre-trial order are as follows:

I.

Plaintiff, Spokane, Portland and Seattle Railway Company contends that the rate applicable to all of the shipments of alcohol involved in this case is Item No. 1497 of the Transcontinental Freight Bureau Tariff 4-T subject to land-grant deductions, and the defendant Reconstruction Finance Corporation contends that Item No. 1563 of said tariff, subject to land-grant deductions, is applicable.

II.

The issues as to computation of rates herein involve mixed questions of law and fact to be determined upon the trial. The parties will supplement the stipulated facts by some explanatory testimony.

III.

Exhibits—Exhibits introduced at the pre-trial are contained in list attached hereto and made a part of this order. All of such exhibits were admitted without objection as to authenticity and plaintiff may object to the admissibility at the trial of defendant's pre-trial Exhibits Nos. 1, 3, 4, 5(F), 6, 12 and 13 on the ground that they are immaterial in this action. No other documents or factual exhibits will be used at the trial [41] or offered as exhibits except those contained in said list.

This order supersedes the pleadings which now pass out of the case. It shall not be amended at trial except to prevent manifest injustice.

Ordered this 14th day of October, 1947.

/s/ JAMES ALGER FEE,
Judge.

Approved by:

/s/ M. B. STRAYER,
Of Attorneys for Plaintiff,

/s/ DEWEY H. PALMER,
Of Attorneys for Defendant.

[Endorsed]: Filed Oct. 14, 1947. [42]

LIST OF DEFENDANT'S PRE-TRIAL
EXHIBITS

1. Photostat copy of letter from A. F. Cleveland, Vice-President, Association of American Railroads, to I. M. Griffin, Traffic Adviser, Defense Supplies Corporation, dated June 28, 1945.

2. Photostat copy of front cover and pages 102, 125, 126, 201, 202 and 209 of Transcontinental Freight Bureau West-Bound Tariff No. 4-T.

3. Photostat copy of front cover and pages 382 and 383 of W. S. Curlett's Agent, Trunk Line Tariff Bureau, Tariff No. 23-M.

4. Photostat copy of front cover and pages 16, 18, 100, and 101 of Import Tariff No. 1021F of Southern Ports Foreign Freight Committee, issued by K. C. Bogue.

5. Photostat copy of front cover and page 2 of Import Freight Tariff No. 1022F of Southern Ports Foreign Freight Committee, issued by Jos. Hattendorf, Agent.

6. Photostat copy of front cover and pages 30, 45, 48, 49, 40 and 51 of New Orleans Freight Bureau Tariff, issued by W. P. Emerson, Jr., Agent, Freight Tariff 14-G.

7. Photostat copies of 12 shipping orders receipted for by Illinois Central Railroad Company, covering shipments in First Cause of Action.

8. Photostat copies of 32 Bills of Lading, covering shipments in Second Cause of Action.

9. Photostat copies of 9 Bills of Lading, issued by Illinois Central Railroad Company, covering

shipments in claim by Defense Supplies Corporation herein for overcharges.

10. Prepaid freight bills on 9 shipments involved in the above mentioned claim against Illinois Central Railroad Company.

11. Copy of bound volume of Transcontinental Freight Bureau West-Bound Tariff No. 4-T.

12. Letter from Finley & Clark, Vice Presidents of Great Northern Railway Company and Northern Pacific Railway Company, dated 8/21/47 addressed to I. M. Griffin.

13. (F) Bound volume of New York Central R. R. Co. Tariff 3010A(F). [43]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On this day the above entitled cause came on for trial and the Court, having heard the evidence, finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. All of the alcohol involved in this proceeding was tax-free alcohol owned by Defense Supplies Corporation and Reconstruction Finance Corporation, each of which are instrumentalities of the United States.

2. Such alcohol was not alcohol in bond within the meaning of Item 1563 of Transcontinental Freight Bureau West Bound Tariff No. 4-T, but was alcohol N.O.S. within the meaning of Item 1497 of said tariff. The applicable rate for all such shipments was that specified in said Item 1497, subject to land grant deductions.

3. There is due and owing to defendant from plaintiff the sum of \$2,119.12 on defendant's counterclaim to plaintiff's first cause of action herein.

4. There is due and owing to plaintiff from defendant the sum of \$1,865.96, on plaintiff's second cause of action herein.

5. There is due and owing to defendant from plaintiff the sum of \$2,489.93, on defendant's permissive counterclaim herein. [44]

CONCLUSIONS OF LAW

The amount due from defendant to plaintiff should be set off against the amounts due from plaintiff to defendant, and judgment should be entered herein in favor of defendant for the sum of \$2,743.09.

It Is So Ordered and judgment will enter in accordance herewith.

JAMES ALGER FEE,
District Judge.

[Endorsed]: Filed Nov. 14, 1947. [45]

In the District Court of the United States
for the District of Oregon

Civil Action—File No. 2764

SPOKANE, PORTLAND AND SEATTLE
RAILWAY COMPANY, a corporation,
Plaintiff,

vs.

RECONSTRUCTION FINANCE CORPORA-
TION, a corporation,
Defendant.

JUDGMENT

This action having come on for trial before the Court without a jury, and the Court having entered herein its Findings of Fact and Conclusions of Law; and the Court being fully advised in the premises, therefore,

It Is Hereby Ordered, Adjudged and Decreed that the defendant have and recover from the plaintiff the sum of \$2,743.09.

Dated at Portland, Oregon, this 24th day of November, 1947.

JAMES ALGER FEE,
District Judge.

Entered in docket Nov. 24, 1947.

[Endorsed]: Filed Nov. 24, 1947. [46]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Reconstruction Finance Corporation, defendant, above named in the above entitled action does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 24th day of November, 1947.

/s/ DEWEY H. PALMER,

Of Attorneys for Reconstruction Finance Corporation, Defendant.

[Endorsed]: Filed Jan. 20, 1948. [47]

[Title of District Court and Cause.]

DEFENDANT, APPELLANT'S DESIGNATION OF RECORD TO BE CONTAINED IN RECORD ON APPEAL

Defendant, Appellant, Reconstruction Finance Corporation, designates the entire record and all proceedings and evidence in the above entitled case to be contained in the record on appeal, including:

1. Complaint.
2. Summons with marshal's return.
3. Order substituting Reconstruction Finance Corporation in place of Defense Supplies Corporation.
4. Answer of Reconstruction Finance Corporation.

5. First amended answer and counterclaim of defendant, Reconstruction Finance Corporation.

6. Motion of plaintiff to strike defendant's counterclaim.

7. Motion for leave to amend answer of defendant Reconstruction Finance Corporation so as to set up Permissive Counterclaim.

8. Pre-trial order including exhibits rejected by the Court.

9. Findings of Fact and Conclusions of Law.

10. Judgment.

11. Transcript of testimony and proceedings at the trial.

12. Notice of appeal by Reconstruction Finance Corporation.

13. This designation.

14. Order to send exhibits.

BY: DEWEY H. PALMER,
Of Attorneys for Reconstruction Finance Corporation, defendant, appellant.

State of Oregon,
County of Multnomah—ss.

Service of the above Designation of Record is hereby accepted at Portland, Oregon, this 4th day of February, 1948, by receiving a copy thereof, duly certified to as such by Dewey H. Palmer of attorneys for defendant, appellant.

/s/ M. B. STRAYER,

Attorneys for Plaintiff,
Appellee.

[Endorsed]: Filed Feb. 4, 1948. [48]

[Title of District Court and Cause.]

ORDER DIRECTING CLERK TO FORWARD
THE ORIGINAL EXHIBITS

On motion of Defendant, Reconstruction Finance Corporation, it is ordered that the Clerk of this Court forward to the Circuit Court of Appeals for the Ninth Circuit in connection with the appeal of the above entitled case all original exhibits including photostatic copies of the originals in accordance with the usual practice of this Court in regard to the safeguarding and transportation of original exhibits.

Dated at Portland, Oregon, this 18th day of February, 1948.

CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed Feb. 18, 1948. [49]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL.

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 52 inclusive constitute the transcript of record on appeal from a judgment of said court

in a cause therein numbered Civil 2764 in which the Spokane, Portland and Seattle Railway Company, a corporation, is plaintiff, and appellee, and the Reconstruction Finance Corporation is defendant and appellant; that the said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant, and in accordance with the rules of court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file at my office and in my custody.

I further certify that I have also enclosed under separate cover a duplicate transcript of the testimony dated October 14, 1947, taken and filed in this office in this cause, together with exhibits Nos. 1 to 13 inclusive filed in this cause.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland in said District, this 20th day of February, 1948.

[Seal]

LOWELL MUNDORFF,

Clerk,

By /s/ F. L. BUCK,

Chief Deputy.

In the District Court of the United States
for the District of Oregon

No. Civ. 2764

SPOKANE, PORTLAND AND SEATTLE
RAILWAY COMPANY, a corporation,
Plaintiff,

vs.

RECONSTRUCTION FINANCE CORPORA-
TION, a corporation,
Defendant.

Before: Honorable James Alger Fee, Judge.

Appearances: Mr. Manley B. Strayer, of Attor-
neys for Plaintiff; Mr. Dewey H. Palmer, of
Attorneys for Defendant.

Court Reporter: Cloyd D. Rauch.

Portland, Oregon

Tuesday, October 14, 1947

PROCEEDINGS

Mr. Strayer: There was a matter I mentioned yesterday, that we would like to have a pre-trial exhibit added to the exhibits, and that would necessitate a change in writing to the pre-trial order. Would it be agreeable that we write that in pen and ink at this time, or should we do that—

The Court: Yes, put that in in pen and ink right now. Was there a firm substitution of the Reconstruction Finance Corporation?

Mr. Palmer: Yes, your Honor, there was.

The Court: The pre-trial order does not recite that, but I presume that is all right. I see no objection. The order is signed and entered. You may proceed.

Mr. Strayer: Does the Court desire an opening statement?

The Court: I will leave that to you.

Mr. Strayer: I thought I might briefly refresh your Honor's recollection. I think we have discussed these matters before. Briefly, there are three causes of action here, two of them in the plaintiff's complaint and one in a counterclaim by the defendant.

One of them, we brought suit for undercharges on two shipments of alcohol, and on the counterclaim the defendant sought recovery on what it claims to be an overcharge on a third shipment of alcohol between the same points. Also, the question of Land Grant rates enters in the causes of action, but in the counterclaim they have been removed by the pre-trial order in view of a recent Supreme Court decision, so that the sole issue remaining on each cause of action and in the counterclaim, the sole issue is whether or not the alcohol involved would be [2*] considered as in-bond alcohol, which would draw a lower rate, or alcohol designated as N.O.S. in the tariff, meaning "Not Otherwise Specified," which would draw a higher rate. In each case the railroad contends that the N.O.S. rate applies and the Government contends that the in-bond rate applies. That is the sole issue in the case.

* Page numbering appearing at top of page of Reporter's certified Transcript of Record.

The pre-trial order reserves to the plaintiff the right to object to the admission of certain exhibits, and the remainder of the exhibits that have been marked, Mr. Palmer and I are in agreement that they may be admitted.

Presently, I would like to ask that the following exhibits be admitted in evidence at this time: Numbers 2, 7, 8, 9, 10 and 11.

Mr. Palmer: No objection.

The Court: They are admitted.

(The documents referred to, so offered and received, were thereupon marked as follows:

(Photostat copy of front cover and pages 102, 125, 126, 201, 202 and 209 of Transcontinental Freight Bureau Westbound Tariff No. 4-T was marked received as Plaintiff's Exhibit 2;

(Photostat copies of 12 shipping orders receipted for by Illinois Central Railroad Company, covering shipments in First Cause of Action, were marked received as Plaintiff's Exhibit 7; [3]

(Photostat copies of 32 Bills of Lading covering shipments in Second Cause of Action were marked received as Plaintiff's Exhibit 8;

(Photostat copies of 9 Bills of Lading, issued by Illinois Central Railroad Company, covering shipments in claim by Defense Supplies Corporation for overcharges were marked received as Plaintiff's Exhibit 9;

(Prepaid freight bills on 9 shipments involved in claim against Illinois Central Railroad Company were marked received as Plaintiff's Exhibit 10; and

(Copy of bound volume of Transcontinental Freight Bureau Westbound Tariff No. 4-T was marked received as Plaintiff's Exhibit 11.)

Mr. Strayer: We will call Mr. Block as a witness.

ERNEST H. BLOCK

was thereupon produced as a witness in behalf of the plaintiff herein and was examined and testified as follows:

The Clerk: What is your name?

A. Ernest H. Block.

(The witness was then duly sworn.)

Direct Examination

By Mr. Strayer:

Q. Mr. Block, you live in Portland?

A. I do.

Q. Are you employed by the Spokane, Portland and Seattle Railway Company? A. I am.

Q. How long have you worked for the company?

A. About twenty-eight and one-half years.

Q. I am sorry, I can't hear you.

A. About twenty-eight and one-half years. A little better than twenty-eight years.

Q. And in what department are you employed?

A. Traffic department.

(Testimony of Ernest H. Block.)

Q. What sort of work do you do?

A. I work principally with rates and to some extent with divisions of rates between carriers.

Q. And does that work involve the application of tariffs to particular situations? [5]

A. It does, a great many times, involves the application and interpretation of tariffs.

Q. Now, are you familiar with the Exhibit 11, which is in evidence, which is the Transcontinental Freight Bureau Westbound Tariff No. 4-T?

A. I am.

Q. How long have you had occasion to work with that tariff?

A. Well, it was issued in 1942, I believe, and naturally I worked with it at the time it was in effect, and things have come up subsequent to the re-issue of that tariff which naturally bring a person back to the old tariff in effect at that time.

Q. Yes. Now, are you familiar with the transactions which are involved in this case, the three shipments of alcohol from Louisiana to Portland, Oregon?

A. I am.

Q. Have you examined the bills of lading and the other documents on those three shipments?

A. Yes, I have.

Q. And in particular have you examined the Plaintiff's Exhibits Nos. 7, 8 and 9 in this proceeding? These are the bills of lading which you examined a while ago, I believe, are they not?

A. Yes, I have examined those bills of lading.

(Testimony of Ernest H. Block.)

Q. Am I correct that in each of these bills of lading the commodity was described as Alcohol NOIBN, Tax Free, and I believe in some instances as Ethyl Alcohol NOIBN, Tax free?

A. You are.

Q. Will you explain to the Court the meaning of the term "NOIBN"? I believe that is explained in the tariff itself, is it not?

A. Yes, there is an item in the tariff that explains the provisions that you cite. The term "NOIBN"—

Q. Just a moment. I believe I would like to have you refer to the tariff. Mr. Bailiff, will you hand the witness Exhibit No. 11. Will you refer to Page 69 of that exhibit, Mr. Block.

A. The term "NOIBN" is explained in Item Number 8, Page 69, of this Transcontinental Freight Bureau Tariff 4-T, and maybe the best explanation is to read the definition as set forth in the tariff rather than to quote my own words. It says, for the explanation of "NOIBN," "When used in connection with an article in an item of this tariff carrying carload commodity rates, means 'not otherwise indexed by name in Western Classification nor otherwise specified in any other item of this tariff carrying carload commodity rates between the same points on that article irrespective of package requirement.' "

Q. Now, as applied to alcohol or ethyl alcohol, does the term "NOIBN" enable you to determine the correct rate for it?

(Testimony of Ernest H. Block.)

A. The term "NOIBN" is not the proper description in conformity with the description of the commodities published in the commodity tariff. The reason for saying that is that there is no item in the tariff that specifically names Alcohol NOIBN as a [7] commodity.

Q. Then in determining the correct rate for those shipments what must you do, Mr. Block?

A. You have to refer to the tariff, and you have another description there, namely, "Alcohol NOS."

Q. Will you tell us what the meaning of "NOS" is then?

A. The term "NOS" is also defined in Item 8, and again I will take the liberty of reading from the tariff: "N.O.S. When used in connection with an article in an item of this tariff carrying carload commodity rates, means 'not otherwise specified in any other item of this tariff carrying carload commodity rates between the same points on that article irrespective of package requirement.' "

Q. Now, Item 1497 of Transcontinental Freight Bureau Westbound Tariff No. 4-T refers to Alcohol NOS, does it not? A. It does.

Q. Now, what are the facts as to the application of Item 1497 to the particular shipments involved in this proceeding?

A. Well, Item 1497 covers Alcohol NOS, which means alcohol not otherwise specified in the tariff. If there were any other commodity item that covered these shipments that item becomes applicable,

(Testimony of Ernest H. Block.)

and the first thing to determine is whether there is any other item that specifically covers the commodity in question.

Q. What are the facts in this case whether there was any item [8] which specifically covered these shipments?

A. There is only one other item in the tariff that covers alcohol—I would like to correct that, please. There are two other items that cover alcohol. One is 1498, covers specific types of alcohol, but none that would cover alcohol as shipped in this particular case. The only other item that covers alcohol is Item 1563, which covers “Alcohol (other than denatured or wood), in bond.” It has been our position that the alcohol involved in this case was not in bond; consequently Item 1563 is inapplicable, and this item being inapplicable automatically makes the provisions of 1497 the proper rate item to apply.

Q. Then, in your opinion as a traffic man, is 1497 the correct item to apply to these shipments?

A. It is.

Mr. Strayer: You may cross-examine.

Cross-Examination

By Mr. Palmer:

Q. How much experience have you had with classifying alcohol, Mr. Block?

A. Well, that is pretty hard to determine, just how much experience I have had. The only answer to that is that in working with rates you work with

(Testimony of Ernest H. Block.)

commodities of all descriptions, and any commodity may come up at a time on which you have occasion to rule as to the applicable rates.

Q. But, I asked you, did you classify very many carloads of [9] alcohol, or apply the rates on very many carloads of alcohol, before these shipments of this tax-free alcohol from New Orleans to Portland?

A. The answer is no, I have not had occasion to——

Q. Would you say that this is the first time that you ever applied rates to a shipment, a carload shipment, of alcohol?

A. To the best of my knowledge, it is.

Mr. Palmer: That is all.

Redirect Examination

By Mr. Strayer:

Q. Do you know, Mr. Block, have you, in your department, had occasion to have the subject up with other traffic men? A. Yes, we have.

Q. The question of classification. Do you know whether the opinion you express is in harmony with that of other traffic men you have had it up with?

A. It is definitely in harmony with that of other traffic men.

Q. Now, do you have occasion to deal with other commodities that are shipped under bond?

A. Yes, principally shipments moving under customs bond.

Q. And have you had occasions to apply your tariffs to those shipments?

A. Quite a number of times, yes.

Mr. Strayer: That is all. [10]

(Testimony of Ernest H. Block.)

Recross-Examination

By Mr. Palmer:

Q. Who were some of these traffic men that you discussed the question with, Mr. Block?

A. Well, that is involved in our correspondence. I have seen the correspondence with other lines.

Q. So that your opinion is based upon correspondence from other lines. Can you give me the names of those other lines in that correspondence, please?

A. Yes, I can. There is the Great Northern, Northern Pacific, Illinois Central.

Q. Now, can you recall what the Illinois Central Railway Company said, in a general way, about the application of this rate?

A. Somewhere along the same lines that I have expressed, that the shipments could not be considered in bond.

Q. The Illinois Central Railway operates in a territory where there are other tariffs involved than the one that you have just referred to, does it not?

A. Yes, it does.

Mr. Palmer: I think that is all.

Mr. Strayer: That is all, Mr. Block.

(Witness excused.)

Mr. Strayer: The plaintiff rests, your Honor.
Plaintiff rests. [11]

Mr. Palmer: The defendant calls Mr. Griffin.

IRVING M. GRIFFIN

was thereupon produced as a witness in behalf of the defendant herein and was examined and testified as follows:

The Clerk: Your full name, Mr. Griffin?

A. Irving M. Griffin.

(The witness was thereupon duly sworn.)

Direct Examination

By Mr. Palmer:

Q. Will you state your present occupation and association, Mr. Griffin, please.

A. I am at present Assistant Director, Office of Defense Supplies, an affiliate of the Reconstruction Finance Corporation of the United States Government.

Q. How long have you been connected with the Reconstruction Finance Corporation?

A. Since April, 1942.

Q. What were your duties since April, 1942, in connection with traffic, in a general way?

A. In a general way, it was supervision of the transits, rates, and the audit of transportation bills, negotiation of rates and contracts.

Q. Prior to your connection with the Reconstruction Finance Corporation, you may state, briefly and generally, what your business was and your positions held and the companies you were [12] connected with.

A. I began transportation work at an early age, in 1893. I was connected with the International & Great Northern Railroad, beginning in the yard

(Testimony of Irving M. Griffin.)

service, developing by promotion to various positions in the freight office at Palestine, Texas, then to Houston, Texas, where I became identified with the local freight station there; promoted successively from bill clerk to chief bill clerk, chief clerk and agent; then agent, joint, at Galveston, Texas, with the I.&G.N., Missouri, Kansas & Texas, and the Galveston, Houston & Henderson Railway. I followed that position with one as General Agent at Galveston, handling import and export commodities, then followed to specializing in cotton, then Assistant General Freight Agent of the I.&G.N.; then joint with the Texas & Pacific Railway; then General Freight Agent of the Texas & Pacific, then Freight Traffic Manager of the Texas & Pacific. In 1918 I resigned from the railroads to accept a position as General Traffic Manager for George H. McFadden & Brothers, cotton exporters. I remained with them until 1937, when I was made Chairman of the Steamship Conferences of the Gulf, making rates and rules and regulations, handling import and export traffic to U.K. and Continental destinations. Then followed a call to Washington that I have just recited at the beginning.

Q. Did that work involve the application of rates, generally, to commodities?

A. Yes, sir, it did. [13]

Q. State what experience you have had in applying rates to alcohol shipments.

A. The War Production Board became prominent in the development of alcohol for national

(Testimony of Irving M. Griffin.)

defense purposes. That alcohol was allocated and shipped in accordance with the requirements of the Government. As a special duty, the alcohol transportation and rates were assigned to my office of Defense Supplies Corporation then, and it was my duty of the office and my own personally to see that proper rates were negotiated and proper rates applied to the movements of alcohol.

Q. You are familiar with the alcohol that is involved in this case and the exhibits that have just been discussed by Mr. Block, and the description on these bills of lading and shipping documents, are you not? A. I am.

Q. That description reads——

A. I might say, if I may, that I filed the claims personally, directed the claims filed, for certain readjustments of transportation charges with the S.P.& S.

Q. Very well. The description "Alcohol NOIBN, Tax Free" is the same description on all the shipments involved in this case?

A. That is my observation.

Q. What, in your opinion, is the correct rate that should be applied, from the tariff that is applicable, to this shipment?

A. It is my opinion, after very careful consideration at the [14] beginning when these claims were filed and proposals were presented to the S.P.& S., that there was only one rate applicable to these shipments, which were Government alcohol and described as tax free, or free of Internal Rev-

(Testimony of Irving M. Griffin.)

enue tax, in some cases—I think all of them read “Tax Free”—it was my definite opinion, as argued with the officials of the S.P.& S., that the rate NOS was not properly applicable, that the proper rate to apply to these shipments was the same as the in-bond rate, the shipments being the same in their relation to the in-bond description.

Q. Why do you say the shipments are the same as the in-bond rate, or should take the in-bond rate?

A. The in-bond rates contemplate, and practically in other tariffs state, that the carriers, the rail carriers, are not responsible for the revenue tax unless a shipment that is in bond is lost or stolen—in other words, not lost by casualty. The shipments described herein were shipments of alcohol which, under the ruling of the Treasury Department, the Internal Revenue regulations, was by permit withdrawn from bonded storage and delivered for transportation to Portland and other ports subsequently for delivery to vessels transporting the goods in lend-lease for national defense.

Q. Was the alcohol bought by the Defense Supplies Corporation? A. It was.

Q. State why the alcohol was tax free?

A. The alcohol was tax free as permitted by the regulations of [15] the Internal Revenue, that the United States Government might withdraw from bonded warehouses this alcohol and it became and it was the property of the Government, and the carriers handling the same were not responsible for any loss or damage whatever; therefore, it was in the

(Testimony of Irving M. Griffin.)

same category and absolutely the same description and understanding as alcohol in bond.

Q. State whether or not, in your experience as a traffic man, it is proper procedure to refer to other traffic manuals in order to get a definition of "in bond"?

A. The careful administrator or traffic man naturally would seek all the information available to correctly describe and assess charges.

Q. Will you answer that question directly? Is it proper procedure, as a traffic man, to refer to other traffic manuals?

A. We always regarded it so.

Mr. Palmer: I wish to offer in evidence at this time Defendant's Pre-Trial Exhibits Numbers 3, 4, 5 and 6.

Mr. Strayer: And 13?

Mr. Palmer: And 13.

Mr. Strayer: If your Honor please, the plaintiff objects to the admission of these exhibits on the ground that they are irrelevant and immaterial to this case, and wishes to point out in particular that the exhibits are tariffs of other lines of carriers not involved in this proceeding, and that the description of the commodity involved, namely, "Alcohol, in bond," is [16] not the same in those tariffs as it is in this proceeding; therefore, it has no bearing. The way that alcohol in bond is described in those tariffs can have no effect here or any bearing on the way that this tariff should be construed.

(Testimony of Irving M. Griffin.)

Mr. Palmer: I want to call to the attention of the Court in these exhibits that the description in these tariffs is the same, so far as—in the outside tariffs, one of them being entitled “Alcohol Tariff, New Orleans Freight Tariff Bureau”—it is Defendant’s Pre-Trial Exhibit No. 6—that is in the very heart of the alcohol transportation center, and the description in this tariff says this, being Item No. 560 on Page 50, “Alcohol, in bond, free of Internal Revenue tax,”—and the “free of Internal Revenue tax” is separated by commas—“in tank cars.”

Item No. 1563 of the applicable tariff to this alcohol read, “Alcohol (other than denatured or wood), in bond.”

Now, the “free of Internal Revenue tax” being separated by commas is explanatory of what “in bond” means. Then I will refer to——

The Court: Well, just a moment. I haven’t admitted these.

Mr. Palmer: How is that, your Honor?

The Court: I haven’t admitted these. You are using them in evidence before I have admitted them.

Mr. Palmer: Oh, I am sorry, your Honor. I was just making an explanation of our position of the——

The Court: Well, I don’t think you are entitled to it as [17] evidence. Certainly I don’t think it is substantive evidence in the case. I think this witness is testifying as an expert. He certainly can say that the reason he bases his opinion is because he has examined the tariffs of other lines and that

(Testimony of Irving M. Griffin.)

they did adopt that procedure. He is testifying as an expert, but this is not admissible, in my opinion, as substantive evidence.

Mr. Palmer: Well, I am asking it to be admitted on the grounds of explanatory evidence in connection with what the definition "in bond" means.

The Court: Well, there is a ground, as I understand it, if that is understood as a term of art, but I don't think that just because other railroads have used it in connection with other phrases indicates that it was a term of art.

Mr. Palmer: Well, I am contending that they have used it in connection with the same phrase, your Honor, and, therefore, it should go in as an explanation and not a term of art.

The Court: Well, if it is a term of art the witness can explain that, but just because it is used in other contracts by other companies is certainly no reason why the Court should use it as a term of art.

Mr. Palmer: Very well, your Honor.

The Court: I reject the exhibits as substantive evidence.

Q. (By Mr. Palmer): Will you state the manner in which "in bond" is defined in other traffic manuals?

Mr. Strayer: Just a moment. I don't believe the witness, [18] your Honor, has testified that the term "in bond" is defined in other traffic manuals.

The Court: The objection is sustained.

(Testimony of Irving M. Griffin.)

Q. (By Mr. Palmer): Will you state from what sources you have determined that tax-free alcohol as it is shipped in this case is the same kind of alcohol as it is described in the applicable West-bound Tariff No. 4-T?

A. The Item 8 in that Transcontinental Tariff referred to by the previous witness defines NOS. By referring to that definition it would state that there are no other items in the tariff on alcohol. As the witness stated, however, there was another item "in tank cars." He did not modify it by "tank cars." And then another item which covered alcohol, in bond. Now, we take it that even technical construction, that the Item 1497, reading, "Alcohol, NOS" is not in accordance with the tariff definition of the meaning of "NOS," because there are other items in the tariff on the commodity Alcohol. We also take it that the Internal Revenue Department permits the movement of alcohol from in-bond production and warehouses under certain conditions. Those conditions generally prescribe or call for bonds for the faithful performance of the conditions as covered in the permits. These are various. They go from movements tax free, where there are no taxes, and the purpose of these permits to move this alcohol was that it becomes commercial and it is not tied up or limited in its location by the warehouse or distillery that [19] produces it, so when it became necessary to move alcohol from storage as in the instant case, why, it was necessary for the Government to get a permit to move that alcohol, which

(Testimony of Irving M. Griffin.)

they did, and it was described and located as free of internal tax, Internal Revenue tax, or tax free, and it was so billed. There would be no reason in the minds of people making the shipments that the Government, the United States Government, who were the owners of this alcohol, should give a bond to themselves or put this alcohol in bond. It certainly was not "Alcohol, NOS," because it was tax free. "Alcohol, NOS" rates, if I may say it, from my investigation and knowledge, were established to cover Alcohol. If there had been no desire on the part of the Government, the Treasury Department, to permit alcohol to move, there would be only one rate, "Alcohol," either "Alcohol, ethyl"—or, not "ethyl," but just "Alcohol," and perhaps they might have said "NOS," but it was necessary to provide rates that would permit the carriers to handle these shipments of alcohol, and the carriers necessarily, finding that they had "NOS," must establish another rate, which was "Alcohol, in bond." Now, that "Alcohol, in bond" does not mean just what it sounds like. It means that the carriers have noted that their responsibility for loss or damage is less or practically nil as compared with "Alcohol, NOS." "Alcohol, NOS," if the tax was paid at the point of production the carrier would be responsible not only for the value of, say, 60 cents a gallon for the alcohol, but [20] would be responsible to the owner of the alcohol for the tax that he had paid, some, perhaps,—at the time this shipment moved I think it was probably six or seven dollars a hundred unit,—

(Testimony of Irving M. Griffin.)

that would be about somewhere around ten dollars, in addition to the value of the alcohol. Now, the Government comes along at that same time and has for transportation in the national defense the movement of this alcohol from Louisiana to Portland for delivery to ships, and they had no reason to give bond to themselves. They were the owners of the alcohol. The alcohol was tax free. The carriers had absolutely no responsibility in case of loss, not a bit, not an iota of responsibility. Therefore, it seems to me, it necessarily follows logically that they should not be called upon to pay 60 cents a gallon—a rate based on carrier's responsibility of 60 cents a gallon plus the tax.

Q. What do you say is the cost per gallon of the alcohol without the tax?

Mr. Strayer: Just a minute,——

A. Oh, from inquiry on that at the time I should say about 60 cents a gallon, 55 or 60 cents per gallon.

Q. (By Mr. Palmer): And how much do you say is the tax per gallon?

A. The tax per gallon,—I have inquired at the present time and I think it is \$9 per taxable unit, that is, per hundred, and this alcohol I think is 160-proof, probably, and nine times [21] \$9—well, 9 times 6 is 54—I think it would be about fifteen or sixteen dollars.

Q. Do you know what the value was at the time of the shipment?

A. Not positively. Just from recollection.

(Testimony of Irving M. Griffin.)

The Court: Well, how do you know all about the carriers not being responsible?

A. Your Honor,—

The Court: You are testifying to a question of law, aren't you? Are you a lawyer?

A. No, sir, unfortunately, Judge, I am not, I wish I were, but in the handling of matters that I have handled for the Government I am called on to deal with the legal sections of our Government, and naturally in attending these meetings with the carriers—I have attended them all in the negotiation of rates—now, a question that comes up always is presented as the responsibility of the carriers. I have discussed that subject with recognized traffic people, as to the items in tariffs which are free in bond, free of Internal Revenue tax, and I have gotten that impression, unquestionably that the carrier is without responsibility in handling those goods.

Mr. Palmer: I think that is all. Cross-examine.

Cross-Examination

By Mr. Strayer:

Q. Mr. Griffin, you say you have talked to traffic men and they say that without exception the in-bond rate applies? [22]

A. No, I don't say that the traffic—the Judge asked me, his Honor asked me, how I got these opinions about what the tariffs meant. I did not testify that I had talked about this particular case. I do say—

Q. Oh, I beg your pardon. I misunderstood you.

A. No, sir.

(Testimony of Irving M. Griffin.)

Q. Do you know of any other tariff, other than this one, where the tariff says only "in bond" without any additional words or phrases?

A. Well, the corresponding Tariff 1-W series of Transcontinental, applying from the Southern district, carries identically the same description of "NOIBN" and "NOS."

Q. Now, as I understand it, you agree, Mr. Griffin, that the NOIBN has no significance in this case?

A. I would say that the NOIBN put in these bills of lading was in error.

Q. Was in error? A. Yes, sir.

Q. And what do you say should have been the correct description of the alcohol?

A. I think that they should have just left that at "Tax Free."

Q. Alcohol, Tax Free? A. Yes, sir.

Q. Now, you agree, also, that there are three items in the applicable tariff here covering alcohol?

A. There are four items, as I recall it.

Q. Now, do you contend that any of the items are applicable other than the Alcohol, in bond, rate?

A. No, sir, I contend that that is the item that is applicable.

Q. You do not contend that it would fall in the Item 1498, the tank-car shipment?

A. They moved in drums.

Q. So the Item 1498 is out? It could not possibly apply?

A. That item covers movement in tank cars, if I remember right.

(Testimony of Irving M. Griffin.)

Q. So that Item 1498 is out, it could not possibly apply?

A. I should think it could not possibly be possible.

Q. Now, what was the other item you referred to?

A. Your witness designated four items.

Q. Mr. Block testified about three of them. I don't recall the fourth.

A. 1497 has two sections, hasn't it?

Q. Oh, I see. A. See.

Q. What I am trying to do is, I am trying to eliminate any other possible items. Perhaps you will agree with me that this alcohol must come under either 1497 or 1563.

A. No, sir.

Q. Is there any other item that could apply?

A. There isn't any other item in the tariff, but I say that the characteristics of Alcohol, Tax Free, puts it in the in-bond [24] section.

Q. What I was trying to do was to eliminate any confusion as to whether there was a third or fourth item that would apply.

A. No, sir.

Q. Now, you agree, also, that there was no bond on this shipment?

A. I am not in position to say that the carriers had a bond for it. When you go into that, if I may discuss it just a minute, you haven't fixed what "in bond" means. The carriers have a bond, and that bond was applicable to this movement.

Q. Now, do you know that, Mr. Griffin?

A. What?

(Testimony of Irving M. Griffin.)

Q. Do you know that?

A. That the carriers have a bond?

Q. That the carriers' bond was applicable to this movement?

A. Well, I couldn't say that. I say that the carriers must give a bond, it is in the Internal Revenue regulations, and I assume that those bonds are issued and are in force.

Q. Don't you know, Mr. Griffin, as a matter of fact, that the carrier's bond does not apply to tax-free alcohol?

A. No, sir, I do not.

Q. Well, do you know whether that is correct or not?

A. I do not.

Q. Well, you don't know whether the carrier's bond applied to this particular shipment?

A. I couldn't say that, no, sir, because I haven't examined the [25] bond.

Q. Now, as I understand you, what you are contending here is that it should be classified as in-bond alcohol because the potential liability of the carrier is the same as it would be in the case of in-bond alcohol?

A. Even less, the same or even less.

Q. And that is your only reason for saying that it should be classified as in bond?

A. That is the reason.

Q. And that is the only reason?

A. I say, that is the reason.

Q. Well, is there any other reason?

A. That is my reason.

Mr. Strayer: That is all.

(Testimony of Irving M. Griffin.)

Redirect Examination

By Mr. Palmer:

Q. Mr. Strayer asked you about if there was any other tariff manual in which alcohol is classified as Alcohol, in bond, without any further explanation. Are you familiar with any—

A. I have observed items in some of the tariffs where it does not qualify it, it does not go on with "free of tax," just "Alcohol, in bond," but I haven't observed any items "Alcohol, NOS" in other tariffs.

Mr. Palmer: I think that is all. [26]

Recross-Examination

By Mr. Strayer:

Q. Let me ask just one more question, if I may. The "NOS," generally speaking, as a tariff man, is a general classification, is it not? It is to be applied where there is no specific item in the tariff covering the shipment?

A. Well, Mr. Strayer, I can only say that the definition put in the record is the definition because it becomes a part of the tariff. Item 8 is a part of the tariff, just the same as 1563.

Q. Now, talking about this specific case, I am asking you for your opinion generally as a tariff man, the phrase "NOS" and item "NOS" is applied only where there is no specific item in the tariff covering a shipment?

A. Not necessarily a specific tariff. It says, just as it says in Item 8, that there is no other item in

(Testimony of Irving M. Griffin.)

that tariff. It is not general in its application to all tariffs. It says in this tariff "NOS," which means that there is no other item in this tariff applicable to the commodity.

Mr. Strayer: That is all.

Mr. Palmer: I want to ask one more question, if I may.

Further Redirect Examination

By Mr. Palmer:

Q. How is "in bond" defined among traffic men generally? A. Among traffic men? [27]

Q. Yes; how is it defined?

A. I can give my opinion, if I am forced to qualify as a traffic man; I can say that my interpretation means——

The Court: No, no, that is not competent.

A. Sir?

The Court: That is not competent, unless it has a well-defined meaning among traffic men.

Q. (By Mr. Palmer): That is what I am getting at: Does it have a well-defined meaning among traffic men?

A. I don't know that I am qualified to give you that answer, except from my own standpoint. Traffic men, you know, get around and exchange ideas and talk in meetings and bureau meetings and discuss things, but I don't know that there's any fixed opinions of what "in bond" means.

Q. Do you know if there is a well-defined meaning of "in bond" among traffic men?

(Testimony of Irving M. Griffin.)

A. I know to that extent that "in bond" means, so far as the liquors are concerned, means the responsibility of the carrier is practically nil, and that is——

The Court: Strike that answer. That is not a definition.

Mr. Palmer: I think that is all, your Honor.

(Witness excused.)

Mr. Palmer: May I have just a moment? I think that is our case, your Honor.

(Defendant rests.)

Mr. Strayer: I would like to call one witness in rebuttal, for just a few questions. Mr. Michelsen.

E. C. MICHELSEN

was thereupon produced as a witness in behalf of the plaintiff, in rebuttal, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Strayer:

Q. Mr. Michelsen, how long have you been with the S. P. & S.? A. Thirty-seven years.

Q. In what capacity are you there now?

A. I am Auditor of Revenue Accounts and also in charge of freight claims.

Q. In connection with your work there do you have occasion to deal with application of the tariff that is involved in this proceeding?

A. Every day.

(Testimony of E. C. Michelsen.)

Q. And do you have occasion to examine and to deal with bills of lading on shipments of in-bond material? A. Very often.

Q. Now, in your experience as a railroad man and in that capacity, Mr. Michelsen, an in-bond shipment, how is it identified on bills of lading?

A. An in-bond is identified on the bills of lading by the use of the words "in bond," and, secondly, it is generally always consigned to a Collector of Customs or a Collector of [29] Internal Revenue, and in many cases the bills of lading will show reference to the Government seals that are on the cars to protect the shipment.

Q. And upon receiving a shipment of that kind do you do anything with reference to notifying the Collector of Internal Revenue?

A. Pardon me, there is another thing I overlooked. Generally the shipment will be accompanied by some manifest papers showing that the shipment has been made under the carrier's bond.

Q. And do you do anything with reference to notification of the Bureau of Internal Revenue or the Collector of Customers on an in-bond shipment?

A. When an in-bond shipment is received at destination the car is put on the hold track and the Collector of Internal Revenue or the Collector of Customs, as the case might be, is immediately notified of the arrival of the shipment.

Q. Now, was that done in the case of these particular shipments? A. No, sir, it was not.

Q. Was there any reference to either the Customs Collector or the Collector of Internal Revenue, with reference to these shipments? A. No, sir.

(Testimony of E. C. Michelsen.)

Q. Was there any manifest indicating that the shipment was in bond? A. No, sir.

Q. Now, Mr. Griffin testified that the carriers had a bond [30] posted here. Are you familiar with the bonds that the carrier has on file?

A. I am.

Q. And does that apply to any other shipments other than in-bond shipments?

A. It applies only to shipments moving to a Collector of Customs for the purpose of collecting import duties. It does not apply and does not cover any shipments of alcohol moving to a Collector of Internal Revenue for the purpose of insuring the collection of Internal Revenue tax.

Q. So far as you know, was there any bond applicable to the movement of the alcohol involved in this proceeding?

A. No, sir, we have no bond of that kind.

Mr. Strayer: You may cross-examine.

Cross-Examination

By Mr. Palmer:

Q. What is the purpose, if you know, of notifying the Collector of Internal Revenue on these in-bond shipments?

A. The purpose is to negotiate the collection—primarily, I should have said, is to negotiate the collection of Internal Revenue tax.

Q. But these shipments that are traveling in the way you have just testified, those are shipments on which the tax has not been paid?

A. That is right. [31]

(Testimony of E. C. Michelsen.)

Q. So that the value of the alcohol is, on this non-paid tax, exactly the same as tax-free alcohol, is it not?

Mr. Strayer: I object to that as immaterial, your Honor.

The Court: Well, he may answer if he wants to.

A. Will you restate the question, please.

Mr. Palmer: Will you read the question, Mr. Rauch.

The Court: You may read the question.

(Pending question read.)

A. I don't know what value the Government would put on the alcohol. I don't know what they would claim in case we lost or destroyed some of it or some of it was stolen.

Mr. Palmer: That is all.

Mr. Strayer: That is all, Mr. Michelsen.

(Witness excused.)

Mr. Strayer: We have nothing further.
Plaintiff rests.

Mr. Palmer: Nothing further.

The Court: Do you want to argue it?

Mr. Strayer: We are willing to submit it without argument, your Honor.

Mr. Palmer: Oh, I think we are willing to submit it without argument, too.

The Court: The findings and judgment will be for the plaintiff. [32] The tariffs, it would seem to be, are exactly descriptive of what the railroad has been contracting to do,—in one case a shipment in

bond, it doesn't say anything about tax free or put any qualification on it, and obviously the shipment did not fall in one of the other classifications; therefore, if it did not fall in the in-bond classification it must necessarily have fallen into the NOS classification, which referred to "Alcohol, Not Otherwise Specified,"—in other words, not included within any other item in the tariff. Now, offhand, I should think that a shipment in bond would mean just exactly what it says, and there is no contention, as I understand it, that this was an in-bond shipment. At least, there is no proof that it was an in-bond shipment. It is true, perhaps, although I am not advised as to that, that conditions may have been the same. However, as I understand the proof in this case, this alcohol was released from bond before it was shipped, and that seems to me to take it entirely out of the classification of the tariff. I have no means of knowing—that is why I asked the witness if he was a lawyer, because I have no means of knowing that these carriers would not be responsible for what would be the market value of the alcohol if it was lost. That may be true, but offhand I wouldn't think so. I think that the Government, if they lost the alcohol, would charge them with the market value.

Mr. Palmer: May I, just in that connection, say that there is a statute that I believe relieves the carrier on some of this [33] tax-free alcohol, and I probably should get that into this case.

The Court: Well, on the other hand, I don't think that makes any difference. That is a subsidiary argument. You may quote the statute, if

you want to, but even if I knew that the Government would not charge the carrier any damages for the loss of the alcohol in full value, nevertheless, in construing this tariff at all I must take into consideration what the tariff says. It doesn't say anything about "tax free." It speaks only of shipment in bond, and, although it might be within the competency of somebody to suggest to the carrier that probably on those bases they should make another division of the tariff, I don't think they did it, and, although I might rationalize, as I am requested to do, I think, and say that the Government ought not to pay any more than the Government should have paid if the Government could have reformed the tariff before they started, I think the Government, like everybody else, should pay what the tariff specifies, and on that basis I decide for the plaintiff.

Mr. Palmer: I think that the pre-trial order provides a certain way that the money is to be awarded. I think we have money coming from the Spokane, Portland and Seattle Railway Company, and the judgment will follow the pre-trial order in that respect?

The Court: Yes.

Mr. Strayer: May I ask your Honor what the Court's practice [34] is concerning findings? Does the prevailing party ordinarily prepare the findings of the Court?

The Court: Well, you can prepare them and submit them, and if both parties are satisfied, unless I see something outstanding, I will sign them. That does not mean that the other party has to be satis-

fied with what the Court has done, but I mean satisfied with the form of expression in the findings. If you will prepare those and submit them and then pass them in to the Court, the Court will look into them and sign them. I may call a conference—I often do that, in order that the Court is sure that everybody is satisfied with the form—but you should prepare formal findings.

Further matters? Court is in recess until 2:00 o'clock.

(Which were all of the proceedings had in the above-entitled cause, and at 12:40 o'clock p.m., Tuesday, October 14, 1947, a recess was had until 2:00 o'clock p.m.)

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Cloyd D. Rauch, a Court Reporter of the above-entitled Court, duly appointed and qualified, do hereby certify that on the 14th day of October, A. D. 1947, I reported in shorthand certain proceedings had in the above-entitled cause, that I subsequently caused my said shorthand notes to be reduced to typewriting, and that the foregoing transcript, pages numbered 1 to 35, both inclusive, constitutes a full, true and accurate transcript of said proceedings, so taken by me in shorthand on said date as aforesaid, and of the whole thereof.

Dated this 12th day of January, A. D. 1948.

/s/ CLOYD D. RAUCH,
Court Reporter. [36]

[Endorsed]: No. 11864. United States Circuit Court of Appeals for the Ninth Circuit. Reconstruction Finance Corporation, a corporation, Appellant, vs. Spokane, Portland and Seattle Railway Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed February 24, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11,864

RECONSTRUCTION FINANCE CORPORATION,
a Corporation,

Appellant,

vs.

SPOKANE, PORTLAND AND SEATTLE
RAILWAY COMPANY, a Corporation,

Appellee.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Appellant herein relies on the following points in the above entitled appeal:

1. The Court erred in finding that: "Such alcohol was not alcohol in bond within the meaning of

Item 1563 of Transcontinental Freight Bureau West-Bound Tariff No. 4-T, but was alcohol N.O.S. within the meaning of Item 1497 of said tariff. The applicable rate for all such shipments was that specified in said Item 1497, subject to land grant deductions.”

2. There was no substantial evidence to sustain the said finding.

3. Said finding is clearly erroneous.

4. Said finding is based upon an erroneous construction of the applicable tariff.

5. The Court erred on the grounds set forth under Nos. 2, 3 and 4 respectively hereinabove in finding as follows:

a. That the sum of \$2,119.12 instead of \$2,826.08 is due and owing to defendant from plaintiff on defendant's counterclaim to plaintiff's first cause of action herein.

b. That the sum of \$1,865.96 is due and owing to plaintiff instead of \$311.28 is due and owing to defendant from plaintiff on the second cause of action herein.

c. That the sum of \$3,012.82 instead of \$2,489.93 is due and owing to defendant from plaintiff on defendant's permissive counterclaim.

6. The court erred on the grounds above stated in not granting judgment in favor of the defendant and against the plaintiff for the sum of \$6,-150.18.

7. The Court erred in sustaining plaintiff's objection to evidence, to wit: Defendant's pre-trial

Exhibits 3, 4, 5 and 6 and 13 were offered in explanation of the term "in bond."

The Court sustained objection of counsel for plaintiff on the ground that the same were irrelevant and immaterial in that the exhibits were part of tariffs of other lines of carriers not involved in the case.

The Court rejected said exhibits, pp. 16, 17 and 18 of Stenographic Transcript of Proceedings in District Court.

Designation of Record

The appellant designates the following parts of the record herein as necessary for the consideration of the foregoing statement of points:

1. Complaint (omitting the exhibits attached thereto) pp. 1 to 4 Incl. of Transcript.
2. First Amended Answer and Counterclaim (omitting the exhibits attached thereto) pp. 20-21 Incl. of Transcript.
3. Order substituting Reconstruction Finance Corporation for Defense Plant Corporation, pp. 10 Transcript.
4. All of the pre-trial order pp. 27-43 Incl. Transcript.
5. Findings of Fact and Conclusions of Law. Pp. 44 and 45 Transcript.
6. Judgment. Pp. 46 Transcript.
7. Notice of Appeal with Clerk's Notation of Notice to plaintiff-appellee. Pp. 27 Transcript.
8. Defendant-Appellant's Designation of Record in District Court. Pp. 48 Transcript.

9. Order of District Court for forwarding of original Exhibits to Circuit Court of Appeals for the Ninth Circuit. Pp. 49 Transcript.
10. All of stenographic transcript of proceedings at trial in District Court including stenographic transcript of testimony at the trial.
11. Defendant's pre-trial exhibits Nos. 3, 4, 5 and 6. Rejected by District Court. (Pp. 16, 17, and 18 Stenographic Transcript of Proceedings in District Court.)
12. Plaintiff's Exhibit No. 2 (Pp. 3 of Stenographic Transcript of Proceedings in District Court).
13. 1 (any one) of the 12 shipping orders of Plaintiff's Exhibit No. 7 (Pp. 3 of Transcript of Proceedings in District Court).
14. 1 (any one) of the 32 Bills of Lading of Plaintiff's Exhibit No. 8 (Pp. 4 of Transcript of Proceedings in District Court).
15. 1 (any one) of 9 Bills of Lading of Plaintiff's Exhibit No. 8 (Pp. 4 of Transcript of Proceedings in District Court).
16. Alcohol Items on Pages 57 and 58 of Defendant's Pre-trial Exhibit 13—Rejected by District Court (Pp. 16, 17 and 18 Transcript of Record District Court.
17. District Court Clerk's Certificate.

Dated February 24, 1948.

/s/ DEWEY H. PALMER,

Of Attorneys for Appellant, Reconstruction Finance Corporation. Post Address 501 U. S. Natl. Bank Bldg., Portland 4, Oregon.

State of Oregon,
County of Multnomah—ss.

Service of the foregoing Appellant's Statement of Point and Designation of Record is hereby accepted at Portland, Oregon, this 24th day of February, 1948.

/s/ M. B. STRAYER,
Of Attorneys for Appellee.

[Endorsed]: Filed Feb. 25, 1948.

[Title of Circuit Court of Appeals and Cause.]

**ORDER THAT ORIGINAL EXHIBITS NEED
NOT BE REPRODUCED IN PRINTED
TRANSCRIPT**

Upon consideration of the request of Mr. Dewey H. Palmer, counsel for appellant, and good cause therefor appearing, It Is Ordered that none of the original exhibits in above cause, consisting of bills of lading, tariffs, etc., need be reproduced in the printed transcript of record, but will be considered by this Court in their original form.

/s/ WILLIAM DENMAN,
United States Circuit Judge.

Dated: San Francisco, Calif., March 4, 1948.

[Endorsed]: Filed March 4, 1948.

In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

RECONSTRUCTION FINANCE CORPORATION,
a corporation,

Appellant,

vs.

SPOKANE, PORTLAND AND SEATTLE RAIL-
WAY COMPANY, a corporation,

Appellee.

BRIEF OF APPELLANT

Upon Appeal from the District Court of the United
States for the District of Oregon.

DEWEY H. PALMER,
501 U. S. National Bank Bldg.,
Portland, Oregon,
Attorney for Appellant.

FILED

HART, SPENCER, McCULLOCH & ROCKWOOD,
CHARLES A. HART,
MANLEY B. STRAYER,
Room 1410 Yeon Bldg.
Portland, Oregon,
Attorneys for Appellee.

MAY 17 1948

PAUL P. O'BRIEN,
CLERK

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In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

RECONSTRUCTION FINANCE CORPORATION,
a corporation,

Appellant,

vs.

SPOKANE, PORTLAND AND SEATTLE RAIL-
WAY COMPANY, a corporation,

Appellee.

BRIEF OF APPELLANT

Upon Appeal from the District Court of the United
States for the District of Oregon.

JURISDICTION

Plaintiff, Appellee, Spokane, Portland & Seattle Rail-
way Co. (hereinafter called Carrier), brought this action
to collect from defendant, appellant, Defense Supplies
Corporation (hereinafter called DSC) undercharges on
certain carload shipments of Ethyl Alcohol transported

from New Orleans and Harvey, Louisiana to Portland, Oregon. The goods moved in Interstate Commerce and were subject to rates as prescribed by the duly filed tariffs with the Interstate Commerce Commission (Complaint Tr. p. 2; Pre-trial Order, Tr. pp. 14-15). The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000. Jurisdiction is invoked under Interstate Commerce Act. 49 U.S.C.A., Sec. 1 et seq.

The Defense Supplies Corporation is a corporation created by the Reconstruction Finance Corporation (hereinafter called RFC) pursuant to Sec. 5(d) (3), of the Reconstruction Finance Corporation Act, 15 U.S.C.A. Sec. 606b(3). Its stock is wholly owned by the RFC, the stock of which, in turn, is wholly owned by the United States. DSC was formed "to procure, acquire, carry, sell, or otherwise deal in strategic and critical material as defined by the President". By Act of Congress, July 1, 1945 (Public Law 109, 79th Congress, Ch. 215, 1st Session), all functions, powers, duties, assets and liabilities of DSC were transferred to RFC. RFC was duly substituted as defendant in this action by order of the District Court (Transcript of Record in this Court, (hereinafter referred to as Tr.) p. 6; Answer and Counterclaim, Tr. p. 8; Pre-trial Order, Tr. p. 15) 15 U.S.C.A. 601 et seq.

STATEMENT OF THE CASE

Appellee, Spokane, Portland & Seattle Railway (hereinafter called Carrier) brought this action as delivering or terminal carrier to collect from Defense Supplies Corporation (hereinafter called DSC), alleged undercharges arising out of the transportation in April, 1943, of 45 carloads of Ethyl Alcohol shipped from New Orleans and Harvey, Louisiana to Portland, Oregon, by DSC to the War Shipping Administrator, as Principal a/c Soviet Government Purchasing Commission.

The complaint as originally filed contained two causes of action aggregating the sum of \$14,145.09 (Tr. p. 2). The RFC as substituted defendant (see above under "Jurisdiction") filed its answer and counter-claimed therein for \$2826.09 (Tr. pp. 6-11). Thereafter RFC filed an additional counterclaim (permissive) for \$17,681.92 which was reduced in the pre-trial order to \$3,012.82 (Tr. p. 14). The complaint involved two disputed matters:

1. The difference between the commercial rate for the transportation of Ethyl Alcohol established under tariffs filed with the Interstate Commerce Commission and lower rates, arrived at by deducting from the tariff rates, certain so-called land grant allowances reserved to the United States under the Transportation Act of 1940.
2. The difference between Item 1497 and Item 1563 of Transcontinental Freight Bureau West-Bound Tariff No. 4-T, the applicable tariff (Tr. p. 32, Pl. Ex. 11).

Before pre-trial Carrier admitted that RFC was en-

titled to the land grant deductions claimed and thereafter the only matter which remained for the Court's determination was the item numbered 2 hereinabove. Such admission also changed the proceeding from one by the Carrier against RFC for the recovery of \$14,145.09 to one whereby RFC would be entitled to recover against the Carrier the sum of \$6,150.18 if the above mentioned Item 1563 of the tariff was the applicable rate, or the sum of \$2,743.09 if the higher rate, Item 1497, was applicable.

The alcohol was shipped to the Soviet Union under Lend Lease Agreement between the United States and the Soviet Government for use by the Army of the Soviet Union in the manufacture of explosives and synthetic rubber. It was transported under an arrangement between the Treasury Department and DSC whereby the charges were to be paid initially by DSC and reimbursed to DSC upon presentation of invoices to the Treasury of the United States Government (Tr. p. 17).

The contested issue framed by the pre-trial order (Tr. pp. 19-20) was whether Item 1497 of the Trans-continental Freight Bureau Tariff 4-T or Item No. 1563 of that tariff (both items subject to land grant deductions) was applicable to the shipments involved.

It was stated in the pre-trial order that the issues as to computation of rates involved mixed questions of law and fact for determination at the trial and the parties "would supplement the stipulated facts by some explanatory testimony" (Tr. p. 20).

Said Items No. 1497 and 1563 are set out in the tariff as follows:

Item 1497—"Alcohol NOS."

Item 1563—Alcohol (other than denatured or wood) in bond.

NOS is defined in the tariff as: "N.O.S. When used in connection with an article in an item of this tariff carrying carload commodity rates means, 'not otherwise specified in any other item of this tariff carrying carload commodity rates between the same points on that article irrespective of package requirements.' "

The rate on Item 1497 is \$1.49 per hundred pounds and the rate on Item 1563 is \$1.23 per hundred pounds. (Tr. p. 35, Pl. Exhibits 2 and 11, Tr. p. 31).

The alcohol was owned by the Defense Supplies Corporation, tax-free and was so described in the Bills of lading (Tr. p. 34). It moved under permit obtained pursuant to U. S. Treasury Department, Bureau of Internal Revenue Regulations 3, covering Industrial Alcohol, Sec. 183.580-.584, entitled Tax-Free Withdrawals by the United States or Governmental Agency (See Appendix, this brief). RFC contends that Item 1563 is the proper classification for the shipments herein involved and the rate of \$1.23 per hundred pounds should be applied. The case was tried without a jury.

The District Court found (quoted in part only) (Tr. pp. 22-23):

"1. All of the alcohol involved in this proceeding was tax-free alcohol owned by Defense Supplies Cor-

poration and Reconstruction Finance Corporation, each of which are instrumentalities of the United States.

“2. Such alcohol was not in bond within the meaning of Item 1563 of Transcontinental Freight Bureau West-Bound Tariff No. 4-T, but was alcohol N.O.S. within the meaning of Item 1497 of said tariff. * * *”

Based upon the findings judgment was entered in favor of RFC against Carrier in the sum of \$2,743.09 (Tr. p. 24).

SPECIFICATIONS OF ERRORS

1. The Court erred in finding that the alcohol was not alcohol in bond within the meaning of Item 1563 of Transcontinental Freight Bureau West-Bound Tariff No. 4-T, but was alcohol NOS within the meaning of Item 1497 of said tariff, and that the applicable rate for all such shipments was that specified in said Item 1497, subject to land grant deductions.
2. Said finding is clearly erroneous.
3. Said finding is based upon an erroneous construction of the applicable tariff.
4. There was no substantial evidence to sustain said finding.
5. The Court erred on the grounds set forth under Nos. 2, 3, and 4 respectively hereinabove in finding as follows:

- a. That the sum of \$2,119.12 instead of \$2,826.08 is due and owing to defendant from plaintiff on defendant's counterclaim to plaintiff's first cause of action herein.
 - b. That the sum of \$1,865.96 is due and owing to plaintiff instead of \$311.28 is due and owing to defendant from plaintiff on the second cause of action herein.
 - c. That the sum of \$3,012.82 instead of \$2,489.93 is due and owing to defendant from plaintiff on defendant's permissive counterclaim.
6. The Court erred on the grounds above stated in not granting judgment in favor of RFC against Carrier for the sum of \$6,150.18.
 7. The Court erred in sustaining plaintiff's objection to evidence, to-wit: RFC's pre-trial Exhibits 3, 4, 5, 6, and 13 were offered in evidence in explanation of the term "in bond".

The Court sustained objection of counsel for plaintiff on the ground that the same were irrelevant and immaterial in that the exhibits were part of tariffs of other lines of carriers not involved in the case. The Court rejected said exhibits (Tr. pp. 44-45).

SUMMARY OF ARGUMENT

The Specifications of Error 1 to 6 inclusive may be considered under two broad divisions, one a question of law, the other, a mixed question of law and fact. The

construction of a tariff is a matter of law for the courts where the words of a tariff have an ordinary meaning. Where the only question is whether the commodity shipped is the commodity referred to in the rate, then a factual question is presented. The Appellant contends that when the tariff Items 1497 and 1563 of the Trans-continental Freight Bureau West-Bound Tariff No. 4-T are properly construed the rate under Item 1563 (the lower rate of the two, or \$1.23 cwt.) should apply.

It is the duty of the Court in construing a tariff to consider the end in view, and the object to be obtained by its framers when this can be done consistently with the words used. In *Chesapeake & O. R. Co. v. V. U. S.*, 1 Fed. Supp. 350, the Court had to determine as a matter of law whether personal effects of U. S. Government and Army officers should be classified so that the "Household Goods" rating or "Emigrant Moveables" rating be applied. The Court after pointing out that the sole and only question for legal construction in such cases is: "What classification applied?", said:

"The question may be intelligently and legally solved not alone by a reading of the terms or words of the respective classifications made, but by their history and the practical and fundamental reasons that are involved in their respective application to shipments of freight."

Of course, an error of law may be corrected by the reviewing Court. Likewise, if the determination of whether the shipments fall within one or the other of two tariff items, particularly when such determination is

based upon undisputed facts and documentary exhibits, the reviewing Court may reverse the findings and the judgment of the lower Court when the Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Co.* (Decided March 8, 1948), U.S., 68 S. Ct. 525, 542, L. Ed.

ARGUMENT

As indicated in the foregoing summary, the Specifications of Error 1 to 6 assign as error, on the grounds therein stated and for the reasons hereinafter appearing, the finding of the District Court that Item 1497 (Alcohol, N.O.S., rate \$1.49 cwt.), is the rate to be applied to the alcohol shipments involved in this case instead of Item 1563 (Alcohol, in bond, rate \$1.23 swt.).

The determination as to which rate should be applied is, of course, inextricably connected with the interpretation of the term "in bond" and the classification of the article transported. The position of the Carrier can be stated, it seems, in the words of its witness, Block, (Tr. p. 36) who testified in part:

"It has been our position that the alcohol involved in this case was not in bond, consequently Item 1563 is inapplicable, and this item being inapplicable automatically makes the provisions of 1497 the proper rate item to apply."

He having just previously read from the tariff, Plaintiff's Exhibit 11 (Tr. pp. 32 and 35), the following:

"N.O.S. When used in connection with an article in

an item of this tariff carrying carload commodity rates, means 'not otherwise specified in any other item of this tariff carrying carload commodity rates between the same points on that article irrespective of package requirements'."

In other words, the Carrier says that the alcohol was not in bond, "or could not be considered in bond" (Re-cross exam. of witness Block, Tr. p. 38) and therefore the NOS rate "automatically" applies.

It is submitted that the question to be settled in this case is not quite so simple.

The alcohol at all times during its transportation was United States Government owned Tax Free Alcohol and was so described in the bills of lading. The term "in bond" as used in the tariff may legally be interpreted to include the alcohol involved herein, for when the question is, what classification applies?, the question may be solved not alone by a reading of the terms and words of the respective classifications made, but by their history and the practical and fundamental reasons that are involved in their respective application to shipments of freight. *Chesapeake & O. R. Co. v. U. S.*, 1 Fed. Supp. 350.

Witness I. M. Griffin, Asst. Director Office of Defense Supplies, RFC, discussed the reasons for the classifications involved in this case, and why Item 1563 was the rate that should be applied, in his testimony (Tr. pp. 46, 47, 48). He stated (in part):

"There would be no reason in the minds of people making the shipments that the Government, the

United States Government, who were the owners of this alcohol should give a bond to themselves or put this alcohol in bond.”

Another point on which he gave testimony was the value of the alcohol, exclusive of tax, being 60 cents a gallon, while the tax thereon was about \$10.00 a gallon. More accurately for the record reference may be here made to the Internal Revenue Code which shows the tax at the time of the shipment of this alcohol was \$6.00 per 160 proof gallon or about \$9.60 per gallon. Section 602, Revenue Act of 1942, 26 U.S.C.A. Internal Revenue Acts, p. 363.

Witness Michelson, an employee of the Carrier was called in rebuttal and gave some testimony concerning procedure on “in bond” shipments, and on Cross-Examination testified that the purpose of notifying the Collector of Internal Revenue on “in-bond” shipments is

“to negotiate the collection—primarily, I should have said, is to negotiate the collection of Internal Revenue Tax.” (Tr. pp. 56 and 57)

The rate on freight is indissolubly bound up with valuation of the article transported. In *U. S. v. Born*, 104 F. (2) 641, C.C.A. 2nd (1939), cert. denied 308 U.S. 606, the status of tax free alcohol became important in connection with a distiller’s bond given to assure the payment of tax of denatured alcohol, free of tax, if such alcohol was diverted to beverage purposes. The Court mentioned that “for all appeared”, Born purchased denatured alcohol from concerns that held it free of tax, and observed:

“It would be quite unreasonable to suppose that tax-wise the denatured alcohol was in a state of flux, now free of tax, and now taxable, depending on the good faith of successive owners.”

In a later case involving the same question, *United States v. Van Shaack Bros.*, (1940) 33 F. Supp. 822, the Court included the above quotation in its opinion with respect to the rule that the basic tax was payable only by the distiller and could not lawfully be assessed against the defendant Shaack Bros.

We quote from witness Griffin’s testimony in the instant case (in part, Tr. p. 6):

“ * * * so when it became necessary to move alcohol from storage as in the instant case, why, it was necessary for the Government to get a permit to move that alcohol, which they did, and it was described and located as free of internal tax, Internal Revenue Tax, or tax free, and it was so billed. * * * .”

The Carrier here makes much of its position that the Alcohol shipped was not in-bond according to its understanding of that term. In *Penn. R. Co. v. U. S.*, No. J-196, Court of Claims, (1930) 42 F. (2) 600, the court pointed out that the defendant made much of the fact that shipments of crepe paper bandages for surgical dressing was not medicated and was not to be applied directly to the wound. When such bandages were shipped there were no tariffs on file with the Interstate Commerce Commission providing a rate on “crepe paper bandages for surgical dressing”, by that name. There were, however, on file with the commission tariffs pro-

viding class rates between the point of origin and destination, applicable as follows:

“Surgical bandages or antiseptic gauze in boxes, first class rate, any quantity, \$2.035 per hundredweight;

“Paper, crepe, in boxes, first class rate, any quantity, \$2.035 per hundredweight.

“Paper, N.O.I.B.N. (not otherwise indexed by name) not printed nor imprinted, in boxes, bundles, crates or rolls, third-class rate less than carload, \$1.555 per hundredweight. * * *”

The railroad billed the U. S. Public Health Service upon a classification of the commodity as coming within either the first or second of the above tariff rates, but the Comptroller General declined to approve the bills, contending that the NOIBN rate was applicable. The Court pointed out that the single issue was the ascertainment of a proper classification for the article involved, and said:

“If the specific article is devoid of features, character, and use which entitle it to be classified as the manufacturer of the article classified it, and possesses no characteristics which bring it within the specific classification contained in the consolidated freight classification, then of course it falls within the comprehensive and general classification N.O.I.B.N.”

The Court found for the railroad carrier from the evidence that the article was a surgical bandage and that either of the first above mentioned two rates should be applied, viz. \$2.035.

In *Macon D. & S. R. Co. v. General Reduction Co.*,

44 F. (2) 499, Cert. denied 283 U.S. 821, the Court stated that the question was whether fuller's earth ought to be hauled as clay had already been determined by the Interstate Commerce Commission and answered in the negative, so that the sole question for the Court was whether the material tendered as fuller's earth, a matter on which the Commission had no superior knowledge. In its decision, the Court distinguished the case under consideration from the cases involving matters which are peculiarly for the handling of the Commission and compared the facts of the fuller's earth case with the shipments of cross-ties involved in *Texas & Pacific Railroad Co. v. American Tie & Timber Co.*, 234 U.S. 138, 34 S. Ct. 885, 58 L. Ed. 1255. The dispute therein was whether cross-ties were included in the lumber classification, there being no rate specifically for cross-ties. There was great dispute among railroad people and lumber men as to whether cross-ties were lumber. The railroads had amendments of rates to include cross-ties pending before the commission. The Supreme Court held that the question as to whether cross-ties ought to be included in the lumber rate was a question within the rate-making responsibilities of the Commission, which the courts ought not to attempt to decide. The Court returning to its discussion of the subject in hand, fuller's earth, said:

“While the question there” (cross-ties case) “has a superficial resemblance to that here, they are at bottom different. In the former case there was no dispute as to the identity of the subject-matter of the shipment, which was agreed to be cross-ties, but

the question was whether they ought to be hauled as lumber and on the same rate as lumber was hauled. This really involved rate making considerations, which are peculiarly for the handling of the commission.”

In *American Rwy. Express Co. v. Price Bros.*, 54 F. (2) 67, 5th C.C.A. (1931), the shipper raised small onions and shipped them in crates to others to plant out and grow to maturity. The Express Co. had a published rate on “Onions, Green”, and a higher rate for “Plants, Strawberry and Vegetables”. The Court directed a verdict for the shipper on the lower rate. On appeal, the Express Co. contended that relief could be had only before the I.C.C. and that the evidence did not demand the verdict. In affirming the Court said (in part):

“ * * * The only question is as to which of the two rates when properly construed was applicable to the thing shipped. This is not a question exclusively for the Interstate Commerce Commission, but is a judicial question which the Courts may handle in the first instance. * * *

“Rate schedules are required to be published by posting, are for the information and use of the general public, and generally words used in them are to have their common meaning.”

Specification of Error No. 7 concerns the rejection by the District Court of certain exhibits offered in evidence by RFC and identified as Defendant’s pre-trial exhibits 3, 4, 5, 6, and 13. (The exhibits are not set out in the printed Transcript of Record since this Court has duly made an Order that such exhibits will be considered in their original form (Tr. p. 66)). Each of the

rejected exhibits is substantially of the same import as said Exhibit 6, which was offered together with the rest of the rejected exhibits as explanatory evidence in connection with the meaning of "in bond" (Tr. p. 45). The court rejected the exhibits as substantive evidence (Tr. p. 45).

We quote the specific objection made by counsel for Carrier:

"If your honor please, the plaintiff objects to the admission of these exhibits on the ground that they are irrelevant and immaterial to this case, and wishes to point out in particular that the exhibits are tariffs of other lines of carriers not involved in this proceeding, and that the description of the commodity involved, namely 'Alcohol, in bond' is not the same in those tariffs as it is in this proceeding; therefore, it has no bearing. The way that alcohol in bond is described in those tariffs can have no effect here or any bearing on the way that this tariff should be construed." (Tr. p. 43)

Plaintiff's pre-trial exhibit No. 6, together with other exhibits, 3, 4, 5, and 13, were admitted without objection as to authenticity and made a part of the pre-trial order with the right reserved for objection to materiality at the trial (Tr. p. 20). The exhibit No. 6 consists of a photostat copy of the front cover and several pages taken from New Orleans Freight Bureau, Freight Tariff 14-G, issued by W. P. Emerson, Jr., agent. It is entitled "ALCOHOL TARIFF". It prescribes rates on Alcohol shipped from Southern States to Southern, Northern and Eastern States.

On page 48 of the exhibit will be found the following:

“Item 515 Alcohol (other than denatured or wood alcohol) in bond (free of internal revenue tax)” etc.

and on page 50:

“Item 560 Alcohol, in bond, free of Internal Revenue tax,” etc.

It is submitted that the foregoing descriptions, the first containing the words “free of internal revenue tax” in parenthesis immediately after the words in bond, and the second, containing the same words, “free of Internal Revenue tax” separated by commas, shows the construction placed upon the words, in bond, by the Carrier and gives to the term the same meaning as testified to by RFC’s witness, Mr. Irving M. Griffin (Tr. pp. 46, 47 and 48).

Such evidence is offered for the same purpose as the arrival notice was offered and admitted in *Standard Brands, Inc. v. Eastern S. S. Lines, Inc.*, (C.C.A. 2) 97 F. (2) 918. The Court said (p. 920):

“* * * The evidence was not received to vary any statutory, or bill of lading, notice but to show that the defendant understood that the words ‘on hand India Wharf’ covered freight also physically at Central Wharf across the slip. The evidence simply explained a phrase customarily employed in the dealings between these parties and disclosed the meaning both attributed to it. * * *”

It is apparent that the subject commodity, Alcohol, is the same article as is described in both the rejected

exhibits and the exhibit consisting of the Transcontinental Freight Bureau Westbound Tariff No. 4-T, the applicable tariff which was admitted as evidence in the instant case (Pl. exhibit 2 and 11, Tr. p. 31 and 32). That the Carrier (SP&S) is a party to the tariff identified in the rejected Exhibit 6 will appear from the following:

1. Illinois Central Railroad is involved in all of the shipments of alcohol shipped in the instant case (Pl. exhibits 7, 8, & 9, consisting of Shipping Orders and Bills of Lading. Admitted (Tr. p. 31) either as originating or intermediate carrier.
2. The front cover of exhibit 6 shows that W. P. Emerson, Jr. is Agent and Attorney for Carriers listed on pages 3 thru 7 of the tariff. While pages 3 thru 7 of this particular tariff are not part of the record in this case, page 30 is and thereon appear the initials "IC" as one of the carrier roads subject to the tariff. The initials "IC" also appear on the bills of lading and shipping documents in connection with the alcohol, shipped in this case and delivered by the Spokane, Portland & Seattle Railway Co. "IC" is the abbreviation of Illinois Central Railroad Company.

The rejected exhibit 13 consists of the bound volume of the New York Central Railroad Company Tariff 3010A and on p. 57 Alcohol is described in the same manner as in the tariff in Exhibit 6, "in bond (free of Internal Revenue tax)" p. 550 and immediately below described as in bond, both items being obviously one and the same commodity and description.

That the Illinois Central Railroad is a party to the said New York Central Tariff appears on page 58 of the rejected exhibit No. 13, again by the abbreviation IC.

3. The Courts take judicial notice of well known methods adopted by Common Carriers in the operation of railroads and it is so generally known that "one carrier collects for all" that this Court may take judicial notice that Spokane, Portland & Seattle Railway, the plaintiff, appellee, designated as Carrier herein is the agent of Illinois Central Railroad Company, and Illinois Central is agent of Carrier.

In conclusion, in determining the meaning of "in bond" it may become necessary to decide the question whether such term has a certain and peculiar meaning known and understood only by a particular class of persons. In *James A. Councilor, et al. v. U. S.*, 89 Ct. Claims 473, the Court of Claims considered the meaning of the words "per diem" used in an employment contract between a Federal Agency and an accounting firm. The accounting firm contended that the established meaning of "per diem" in its business of 7 hours a day should be read into the contract. In holding for this construction, the Court cited (p. 480, supra) and quoted from Mr. Justice Rossman's opinion in *Hurst v. W. J. Lake & Co.*, 141 Or. 306, in which the rule is stated to be that: Members of trade or business group employing trade terms in written contract may prove such fact and show meaning of terms though instrument is unambiguous on its face.

In *Gill v. Benjamin Realty & Holding Co.*, (C.C.A. 3rd) 43 F. (2) 337 (Cert. denied 282 U.S. 892), the meaning of the term "Series B" became important with respect to a construction contract for the building of the

Benjamin Franklin Hotel in Philadelphia. The Court said (p. 338):

“We cannot dogmatically say what ‘Series B’ means when applied to the position of the lien of bonds secured by a second mortgage. The testimony clearly shows that these words do not have any generally accepted meaning when thus used. They therefore brought into the description of the bonds a real ambiguity.”

In *Lowrey v. Hawaii*, 206 U.S. 206, 27 S. Ct. 622, 626, Mr. Justice McKenna discussed the interpretation of the words involved, viz., “sound literature and solid science”, and said (quoted from p. 218 of 206 U.S.):

“The contentions of the parties are sharply in opposition as to the agreement and the necessity and competency of extrinsic evidence to explain it.”

and at p. 221, said:

“In *Brooklyn Life Insurance Co.*, 95 U.S. 269, it was said ‘There is no surer way to find out what parties meant than to see what they have done.’ So obvious and potent a principle hardly needs the repetition it has received. And equally obvious and potent is a resort to the circumstances and conditions which preceded a contract. Necessarily in such circumstances and conditions will be found the inducement to the contract and a test of its purpose. The conventions of parties may change such circumstances and conditions, or continue them, but it cannot separate them. And this makes the value of contemporaneous construction. It is valuable to explain a statute where disinterested judgment is alone invoked and exercised. It is of greater value to explain a contract where self-interest is quick to discern the extent of rights or obligations, and never

yield more than the written or spoken word requires. * * * .”

The judgment entered in the District Court for \$2,-743.09 in favor of RFC and against the Carrier should be corrected so that the RFC is granted judgment against the Carrier for the sum of \$6,150.18 and the findings to support such judgment be made to read “Such alcohol was alcohol in bond within the meaning of Item 1563 of Transcontinental Freight Bureau West-Bound Tariff No. 4-T, and not alcohol N.O.S. within the meaning of Item 1497.”

Respectfully submitted,

DEWEY H. PALMER,

Attorney for Appellant, Recon-
struction Finance Corporation.

APPENDIX I**TAX-FREE WITHDRAWALS BY THE UNITED STATES OR GOVERNMENTAL AGENCY**

Sec. 182.580 General.—Alcohol may be withdrawn from any industrial alcohol plant or bonded warehouse tax-free for the use of the United States or any governmental agency thereof, pursuant to permit issued on Form 1444. (*; Sec. 3108 (b), I. R. C.)

Sec. 182.581 Permit, Form 1444.—The proprietor of the warehouse may not ship alcohol to the United States or governmental agency thereof unless he is named as vendor in the basic permit, Form 1444, and such permit is in his possession. The permit may remain in the possession of the proprietor of the bonded warehouse until it is canceled or is recalled by the department or governmental agency to which issued. (*; Secs. 3101, 3108 (b), 3114 (a), I. R. C.)

Sec. 182.582 Gauge of alcohol.—The proprietor will gauge each package of alcohol withdrawn tax-free, unless withdrawn on the original gauge, and prepare Form 1440, in triplicate, giving the details of such gauge. The packages shall be marked in accordance with sections 182.518 to 182.526. Upon shipment of the alcohol, one copy of Form 1440 will be forwarded to the supervisor of the district in which the warehouse is located and one copy to the consignee. The remaining copy will be filed at the warehouse as a permanent record in accordance with section 182.643. (*; Secs. 3101, 3103, 3108 (b), I. R. C.)

Sec. 182.583 Bill of lading.—Where the alcohol is transported from the bonded warehouse by a common carrier, the person to whom the alcohol was delivered for shipment shall furnish a copy of the bill of lading covering transportation of the alcohol from the point of shipment to final destination to the storekeeper-

gauger, who will forward the same to the district supervisor with Form 1440. (*; Sec. 3101, I. R. C.)

Sec. 182.584 Notice and receipt of shipment, Form 1453—At the time of shipping alcohol tax-free to the United States or governmental agency thereof, the proprietor will prepare Form 1453 and forward it to the Government officer to whom the alcohol is to be delivered at destination. Such Government officer, upon receiving the shipment, will execute the certificate of receipt and forward the form to the district supervisor specified at the bottom of the form. (*; Secs. 3101, 3108 (b), I. R. C.)

Taken from
U. S. Treasury Department
Bureau of Internal Revenue
Regulations 3
Industrial Alcohol
1942

Issued under authority contained in Sections 3105,
3124 (a) (6) and 3176, Internal Revenue Code
(Public No. 1, 76th Congress)

United States Circuit Court
of Appeals

For the Ninth Circuit

RECONSTRUCTION FINANCE CORPORATION, a corporation,
Appellant,

vs.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY,
a corporation,

Appellee.

Upon Appeal from the United States District Court
For the District of Oregon.

BRIEF OF APPELLEE

CHARLES A. HART,
MANLEY B. STRAYER,
HART, SPENCER, McCULLOCH & ROCKWOOD,
Attorneys for Appellee.

FILED

JUN 1 1932

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No. 11864

United States Circuit Court
of Appeals

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Appellant,

vs.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY,
a corporation,

Appellee.

Upon Appeal from the United States District Court
For the District of Oregon.

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellant's statement of facts is substantially correct. The issue at the trial and the one to be determined on this appeal is which of two items of appellee's tariff is applicable. Item 1563 of the tariff,

which appellant contends was applicable, was specifically limited to alcohol in bond. If this item is not applicable to the alcohol involved, it automatically becomes subject to Item 1497 of the tariff, which applies generally to all alcohol not otherwise specified. The ultimate issue, therefore, is whether the alcohol involved in the particular shipments was alcohol in bond within the meaning of Item 1563 of the tariff.

SUMMARY OF ARGUMENT

1. The words of a tariff are to be given their common meaning and neither carrier nor shipper can be permitted to urge a strained and unnatural construction.

American Ry. Express Co., Inc. v. Price Bros., Inc. (5 C. C. A.), 54 F. (2d) 67.

Armstrong Mfg. Co. v. Aberdeen & Rockfish R. R. Co., 96 I. C. C. 595.

2. The term "alcohol in bond" has a well-defined meaning in law which excludes tax-free alcohol.

26 U. S. C. A. 2800, et seq.

3. Only the Interstate Commerce Commission has the authority to determine whether rates fixed by a tariff are reasonable.

Great Northern R. R. Co., et al., v. Merchants Elevator Co. (1922), 259 U. S. 285, 42 S. Ct. 477.

4. Where the words of a tariff are used in a peculiar sense and there is a dispute as to the meaning, the preliminary determination of such dispute must be made by the Interstate Commerce Commission.

Great Northern R. R. Co., et al., v. Merchants Elevator Co., supra.

Texas & Pacific R. R. Co. v. American Tie & Tbr. Co., 234 U. S. 138, 34 S. Ct. 885.

Macon D. & S. Ry. Co. v. General Reduction Co. (C. C. A. 1930), 44 F. (2d) 499, 283 U. S. 821, 51 S. Ct. 345.

5. The rule of *res inter alios acta* precludes the admission in evidence of transactions between either strangers to the action, or one party to the action and a stranger.

20 Am. Jur. 280.

Boord v. Kaylor, 100 Ore. 366, 197 Pac. 296.

State v. German, 162 Ore. 166, 184, 90 P. (2d) 185.

Chapman v. Metropolitan Life Ins. Co. (S. C.), 173 S. E. 801.

Chicago and E. I. R. Co. v. Schultz (Ill.), 71 N. E. 1050.

ARGUMENT

In determining the proper application of the tariff, the words used therein are to be given their common meaning. *American Ry. Express Co., Inc. v. Price Bros., Inc.* (5 C. C. A.), 54 F. (2d) 67. In *Armstrong Mfg. Co. v. Aberdeen & Rockfish R. R. Co.*, 96 I. C. C. 595, it is said:

“While doubts as to the meaning of a tariff must be resolved in favor of the shipper and against the carrier which compiled it, the doubt must be a reasonable one. In interpreting a tariff the terms used must be taken in the sense in which they are generally understood and accepted commercially and neither carriers nor shippers can be permitted to urge for their own purposes a strained and unnatural construction.”

The term “alcohol in bond” has a well-defined meaning in law which is derived from Chapter 26 of the Internal Revenue Code (26 U. S. C. A. 2800 et seq.). This code deals with taxes on distilled spirits and sets up a system of control to insure collection of the tax. Under the system, prior to payment of the tax, alcohol is held in bonded warehouses, the purpose of the bond being to insure that it will not be withdrawn without payment of the tax. The law provides that the tax will be paid when the alcohol is withdrawn from bond (26 U. S. C. A. 2800).

At the trial, Mr. Michelsen testified concerning the method of handling shipments of commodities in bond. In such instances the bill of lading identifies the shipment as "in bond" and the shipment is always consigned either to the Collector of Customs or the Collector of Internal Revenue. It is generally accompanied by manifest papers showing the shipment is made under a carrier's bond. In such cases the Collector of Customs or the Collector of Internal Revenue is immediately notified on arrival of the shipment. The carrier's bond referred to applies only to shipments moving to the Collector of Customs, and not to those moving to the Collector of Internal Revenue, in which cases no carrier's bond is in effect (Tr. 56, 57).

There is no contention here that the alcohol was subject to a bond as described in the Internal Revenue Code. As pointed out by the trial court, the alcohol was released from bond when it was shipped (Tr. 59); and as testified to by Mr. Michelsen, there was no carrier's bond covering the shipment (Tr. 57).

It is thus seen that the term "alcohol in bond" has a well-defined meaning in law. It is alcohol upon which a bond is maintained to insure the payment

of internal revenue tax. Necessarily, in such a case, the tax has not been paid. But it does not follow that all alcohol upon which no tax has been paid is alcohol in bond. The very term "in bond" implies that a tax will be paid when it is withdrawn from bond, and therefore that it cannot be tax free. The very term "tax free" means that no tax is payable and, therefore, that there is no bond to insure payment. In these circumstances we see no room for argument that because the alcohol was tax free it was therefore alcohol in bond.

Appellant argues that the "in bond" rate should apply to tax-free alcohol because the hazard to the carrier in case of loss or damage to the shipment is the same as in the case of alcohol in bond. This argument, however, goes to the question of whether the tariff rate is reasonable and is a question which lies exclusively within the jurisdiction of the Interstate Commerce Commission. *Great Northern Railway Company, et al., v. Merchants Elevator Company* (1922), 259 U. S. 285, 42 S. Ct. 477.

It is well settled that if the words in the tariff are used in their ordinary sense, the court has authority to determine the meaning of the words and apply that meaning to the undisputed facts. Likewise, if

the only question is one of fact concerning the identity of the commodity, the court has power to make the determination. But if a peculiar meaning is to be attached to the words used in a tariff and there is a dispute concerning such meaning, the inquiry is one of fact and of discretion in technical matters, and in such cases there must be a preliminary determination by the Interstate Commerce Commission before a court will take jurisdiction of the controversy. In *Great Northern Railway Company, et al., v. Merchants Elevator Company*, supra, the Court said:

“But where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made, can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained. For the effect to be given the tariff might depend, not upon construction of the language — a question of law — but upon whether or not a particular judge or jury had found, as a fact, that the words of the document were used in the peculiar sense attributed to them or that a particular usage existed.”

As we have pointed out, if the term "alcohol in bond" is to be given its usual meaning as derived from the Internal Revenue Code, alcohol which has been withdrawn from bond, which is tax free, and upon which no bond is posted, is clearly not within the term "alcohol in bond." We believe that the term "alcohol in bond" is unambiguous and is of such well-defined and established meaning that the only course open to the District Court was to hold that the alcohol involved herein was not in bond. But if it is considered that the term "alcohol in bond" is ambiguous, or has been used in a sense other than that ordinarily understood, then, since there is a conflict of opinion whether the term applies to tax-free alcohol, there is an issue of fact as to what meaning was intended and, in the interest of uniformity, there must first be a determination by the Interstate Commerce Commission before the court will assume jurisdiction. *Great Northern Railway Company v. Merchants Elevator Company*, supra; *Texas and Pacific Railway Company v. American Tie and Timber Company*, 234 U. S. 138, 34 S. Ct. 885.

The case last cited involved a controversy whether oak railway crossties were included in the tariff rates for lumber. The testimony disclosed an irreconcilable

conflict concerning whether crossties were lumber. In these circumstances the court held that the question was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by statute. The court said that it could not, as an original question, exert authority over subjects which primarily come within the jurisdiction of the Commission.

In one of the cases cited by the appellant (*Macon D. & S. R. Company v. General Reduction Co.* (C. C. A. 1930), 44 F. (2d) 499, certiorari denied, 283 U. S. 821, 51 S. Ct. 345), the court commented upon the Texas and Pacific Railroad Company case, pointing out that there was no dispute as to the identity of the subject matter of the shipment, which was agreed to be crossties, but that the question was whether they ought to be hauled as lumber on the same rate as lumber, which really involved rate-making considerations peculiarly for the handling of the Commission.

In like manner, in the case at bar, there is no dispute as to the identity of the commodity involved. It is agreed that it was tax-free alcohol which had

been withdrawn from bond. The only question raised is whether, by use of the term "alcohol in bond," the carrier intended to include alcohol not in bond but as to which the hazard in case of loss was the same. This is a question of fact and of discretion in technical matters which may be considered only by the Interstate Commerce Commission.

None of the cases cited by appellant support its position. The case of *Macon D. & S. R. Company v. General Reduction Company*, supra, involved solely a factual question whether the commodity involved was clay or fuller's earth. The court was not required to extend the meaning of the words used in the tariff. The sole question was one of identity which the court had power to determine.

In the case of *Pennsylvania Railroad Company v. United States* (Court of Claims 1930), 42 F. (2d) 600, the particular question was whether crepe paper bandages could be considered as covered by the tariff classification of "surgical bandages," or whether it fell within the general classification of "paper, NOIBN." The court observed that if the commodity was devoid of features which entitled it to specific classification, then it would fall in the general classification. It was contended that the crepe paper band-

ages were not surgical bandages because they could not be applied directly to wounds. The court found, however, as a matter of fact, that the commodity was a surgical bandage as generally understood in the trade, even though it could not be applied directly to wounds. The ordinary meaning of surgical bandages did not require that they be suitable for direct application to wounds. Here again the question was solely a factual one of identity, which was within the power of the court to decide. No extraordinary meaning was attached to the words used in the tariff.

In *American Railway Express Company v. Price Bros. Inc.* (5 C. C. A. 1931), 54 F. (2d) 67, the sole question involved was whether small onions shipped for purposes of planting fell within the tariff classification "onions, green." There was no claim of ambiguity or that the words used in the tariff had a peculiar or unusual meaning. The only question was whether the commodity involved fell within the usual meaning of such words.

In the case at bar, unlike the cases cited by the appellant, if the ordinary and usual meaning is attributed to the use of the words "alcohol in bond," it is clear that this item of the tariff was not appli-

cable to tax-free alcohol upon which no bond was maintained. In order to extend the meaning of the term it would be necessary to find that it had been used in a peculiar sense not expressed in the language of the tariff. This cannot be accomplished merely by showing that the commodity involved, although different in character, should have the same rate as that afforded to alcohol in bond.

Appellant alleges in its Seventh Specification of Error that the court erred in rejecting certain exhibits consisting of tariffs of carriers other than appellee not applicable to the shipments here involved. At the time of the offer of these exhibits appellant's witness, Griffin, was on the stand giving expert testimony concerning his interpretation of the applicable tariff (Tr. 43). Counsel for appellant urged that the exhibits should be received "as an explanation" of the meaning to be attached to the words "alcohol in bond" (Tr. 45). It was not explained to the court that any lines interested in the shipments involved in this case were parties to such tariffs. Appellant now urges for the first time, however, that Illinois Central Railway Company was a party to such tariffs and was one of the carriers participating in the shipments involved herein; and that for such

reasons the exhibits were admissible to show the interpretation which the carriers placed on Transcontinental Freight Bureau Westbound Tariff No. 4-T, which applied to the shipments involved herein.

Insofar as concerns appellee, any statements in other tariffs to which it was not a party were clearly inadmissible. The rule of *res inter alias acta* precludes the introduction of evidence of transactions not affecting a party to an action and to which he was not a party. 20 Am. Jur. 280; *Boord v. Kaylor*, 100 Ore. 366, 197 Pac. 296; *State v. German*, 162 Ore. 166, 184, 90 P. (2d) 185; *Chapman v. Metropolitan Life Insurance Co.* (S. C.) 173 S. E. 801; *Chicago and E. I. R. Co. v. Schultz* (Ill.) 71 N. E. 1050. The fact that Illinois Central Railway Company had participated with carriers other than appellee in tariffs specifying the same rate for alcohol in bond and tax-free alcohol could not possibly bind appellee or indicate a similar intention of the carriers participating in the tariff applicable to the shipments involved herein.

The exhibits were offered for the purported purpose of showing the construction which other carriers had given to the term "alcohol in bond." How-

ever, actually they showed at most a policy of granting the "in bond" rate to tax-free alcohol. If any significance at all can be attached to the rejected exhibits, the fact that the carriers participating therein deemed it necessary to mention specifically tax-free alcohol would seem to indicate that they did not consider it included within the definition of alcohol in bond.

The District Court afforded appellant the opportunity to show that the opinion of its expert was based in part upon the fact that the tariffs of other lines treated tax-free alcohol as alcohol in bond (Tr. 44), but appellant failed to avail itself of this opportunity. The reason for the failure is, perhaps, indicated by the following testimony of appellant's witness Griffin:

"Traffic men, you know, get around and exchange ideas and talk in meetings and Bureau meetings and discuss things, *but I don't know that there's any fixed opinions of what 'in bond' means.*" (Tr. 54). (Emphasis supplied).

In any event, the evidence rejected, if it had any probative value, related entirely to a dispute as to the meaning of the term "alcohol in bond." As we

have stated, if something other than the ordinary meaning is to be given to the term, only the Interstate Commerce Commission had power to decide this dispute in the first instance and no evidence thereon was admissible.

It is therefore respectfully submitted that the judgment of the District Court should be affirmed.

MANLEY B. STRAYER,

HART, SPENCER, McCULLOCH & ROCKWOOD,

Attorneys for Appellee.

In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

RECONSTRUCTION FINANCE CORPORATION,
a corporation,

Appellant,

vs.

SPOKANE, PORTLAND AND SEATTLE RAIL-
WAY COMPANY, a corporation,

Appellee.

REPLY BRIEF OF APPELLANT

Upon Appeal from the United States District Court for
the District of Oregon.

DEWEY H. PALMER,
501 U. S. National Bank Bldg.,
Portland, Oregon,
Attorney for Appellant.

HART, SPENCER, McCULLOCH & ROCKWOOD,
CHARLES A. HART,
MANLEY B. STRAYER,
Room 1410 Yeon Bldg.,
Portland, Oregon,
Attorneys for Appellee.

FILED

JUN 17 1948

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REPLY BRIEF OF APPELLANT

Upon Appeal from the United States District Court for
the District of Oregon.

ARGUMENT

When Appellee states that the term "alcohol in bond" has a "well-defined meaning in law which is derived from Chapter 26 of the Internal Revenue Code (26 U.S.C.A. 2800 et seq.)" it resorts to the same method of interpretation as that of the Railroad Company in *St. Louis, I. M. & S. Ry. Co. v. J. F. Hasty & Sons*, 255 U.S. 252, 41 S. Ct. 269. The appellee reads the "Code" and its tariff too narrowly. In *St. Louis I. M.*

& S. Ry. Co. v. Hasty & Sons, the dispute arose over alleged overcharges on rough material shipped to mills for manufacture into heading for barrels. We quote from the opinion by Mr. Justice Pitney (p. 270 of 41 S. Ct.):

“Appellant’s” (railroad) “contention is based upon a literal reading of the opening sentence of Item 79: ‘Rough material rates applicable on rough lumber, staves, flitches, bolts and logs,’ etc. and since ‘rough heading’ is not mentioned here, while the associated material ‘staves’ is specified, it is contended that rough heading is not provided for.

“From the testimony taken before the master it would appear that the raw material from which barrel heads are made is variously described as rough heading, sawed heading, split heading, and bolts or heading bolts; but it also appears that, whatever may be the distinctions, the terms are used loosely and indiscriminately in the trade and in billing shipments, material of either description being considered rough material, and all having been handled by the railway company under the rough material rate on its own schedules without regard to particular terms.

“We regard appellant’s reading of Item 79 as altogether too narrow. The scope and effect of the rough material rates should be determined not by regarding the opening sentence alone, but by looking also to the list of finished products to be manufactured from the material, and considering the general purpose of Item 79. * * *”

As in the instant case, the Railway Company in the above discussed “barrel stave” case cited *Texas & Pacific Ry. v. American Tie Co.*, 234 U.S. 138, 146, 34 S. Ct. 885, 58 L. Ed. 1255, (cross ties case discussed in Appellant’s opening brief p. 14 and in Appellee’s brief p. 8)

in support of its contention that the construction was a matter for the Interstate Commerce Commission. The Court dismissed this contention by stating that the matter was "so free from doubt that there is no occasion to apply to the commission for a construction as insisted by appellant under *Texas & Pacific Ry. v. American Tie Co.* * * *."

It is submitted that the same rule was applied in this barrel stave case as was applied in the "emigrant moveables" case, *Chesapeake & O. R. Co. v. U. S.*, 1 Fed. Supp. 350, discussed in our opening brief at page 10, viz: that mere reading of the terms or words of the respective classifications is not sufficient in interpreting the tariff, but that the Court may consider the historical and practical and fundamental reasons involved in the making of the classifications.

In *Penn. R. Co. v. U. S.* (Court of Claims), 42 F. (2) 600, cited in Appellant's Opening brief (pp. 12 and 13), the surgical bandages case, the Court indicated the characteristics to be considered by the Court in making the classification and said that if the specific article is "devoid of features, character and use * * * and possesses no characteristics which bring it within the specific classification * * * then of course it falls within the comprehensive and general classification of N.O.I.B.N."

So that in this case in order to entitle the Appellee to charge the higher rate and "automatically" place the subject Alcohol in the NOS classification, it must be

determined that the shipment possesses no characteristic which brings it within the specific classification. Appellee attempts to do this by "deriving" a well-defined meaning in law of the term alcohol in bond from its reading of the Internal Revenue Code, 26 U.S.A. 2800 et seq. Appellee's counsel states (Appellee's brief pp. 4 and 5) that this "code deals with taxes on distilled spirits and sets up a system of control to insure collection of the tax" and then proceeds to argue its version of what a well defined meaning in law of the term alcohol in bond is. But in its argument it makes a very significant omission. Such omission is the salient feature that the alcohol shipped was at all times during shipment owned by the United States Government, tax-free, and was so described in the bills of lading (Tr. p. 34, Appellant's opening brief p. 5 and p. 10). To follow Appellee's argument to its logical conclusion would result in the United States Government giving bond to itself when shipping alcohol transported under permit as provided for by law. The Defense Supplies Corporation is the United States Government. *Defense Supplies Corporation v. U. S. Lines*, 148 F. (2) 311; *Southern Pacific Co. v. RFC*, 161 F. (2) 56, 59 (C.C.A. 9th). The very system of control which Appellee mentions in its brief to insure collection of tax and from which this well-defined meaning in law of the term alcohol in bond is "derived" by Appellee provides a device for the handling and transportation of United States Government owned alcohol for use by the United States and its instrumental-

ities (Appendix 1, Appellant's opening brief). It is undisputed that such a device was used in this case. A proper evaluation of this feature and characteristic will support a finding that the alcohol was actually "in bond" within the sense of Item 1563.

An additional characteristic that may be considered in making the classification of this shipment or in identifying the commodity as to which Item of the tariff is applicable, is the value of the alcohol and the liability of the carrier for the transportation. The alcohol without tax was worth 60 cents a gallon. The tax at the time of shipment was \$6 per 100 proof gallon or about \$9.60 per 160 proof gallon.

Respectfully submitted,

DEWEY H. PALMER,
Attorney for Appellant.

In the United States
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RECONSTRUCTION FINANCE CORPORATION,
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vs.

SPOKANE, PORTLAND AND SEATTLE RAIL-
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PETITION OF APPELLANT FOR REHEARING

Upon Appeal from the United States District Court for
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DEWEY H. PALMER,
501 U. S. National Bank Bldg.,
Portland, Oregon,
Attorney for Appellant.

HART, SPENCER, McCULLOCH & ROCKWOOD,
CHARLES A. HART,
MANLEY B. STRAYER,
Room 1410 Yeon Bldg.,
Portland, Oregon,
Attorneys for Appellee.

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In the United States
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Appellee.

PETITION OF APPELLANT FOR REHEARING

Upon Appeal from the United States District Court for
the District of Oregon.

To the Court of Appeals and the Judges Thereof:

Comes now Reconstruction Finance Corporation, the
appellant in the above entitled cause and presents this,
its petition, for a rehearing of the above entitled cause,
and, in support thereof, respectfully shows:

I.

Though it is held that the evidence in this case was
insufficient for a finding that Item 1563 (in-bond) cov-

ers all shipments upon which the alcohol tax has not been paid, and also all alcohol upon which no tax is required to be paid, it would not necessarily follow that the evidence was sufficient to require a finding that the alcohol herein involved was not "in-bond" within the sense of Item 1563 (Tr. of Rec. p. 17 and p. 22).

The District Court found that the alcohol in suit was tax-free alcohol owned by Defense Supplies Corporation and Reconstruction Finance Corporation, each of which are instrumentalities of the United States, and such alcohol was not alcohol in bond within the meaning of Item 1563, etc. * * *. In the pre-trial order it was stipulated that the applicable rate was subject to land grant deductions and therefore by necessary implication the ownership of the alcohol must be in the United States Government (Tr. of Rec. p. 17 and p. 22).

Hence, the alcohol in suit is readily distinguishable with reference to the term "in-bond" from all alcohol otherwise owned and tax-free. For the bond contemplated by the term "in-bond" in the tariff is a bond given to the United States Government to secure the payment of a tax, which tax is payable to the United States. So that the characteristics of shipments of tax-free alcohol owned by the United States and transported from one of its agencies to another as a commodity appears to be identical with alcohol privately owned and transported in-bond except for the doing of what seems a vain or useless, if not impossible thing, the giving of a bond from the Shipper to itself.

“It is an accepted canon of construction that a statute is not to be construed as requiring a vain thing.”

Lawrence Warehouse Co. v. Defense Supplies Corporation, 168 F. (2d) 199 at 209.

50 Am. Jur. (Statutes) Sec. 377.

State v. Gates, 104 Or. 112, 206 P. 863 at 866.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the judgment of the District Court be upon further consideration reversed.

Respectfully submitted,

DEWEY H. PALMER,

Counsel for Appellant.

CERTIFICATE OF COUNSEL

I, counsel for the above named appellant, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

DEWEY H. PALMER,

Counsel for Appellant.

